85-529

Supreme Court, U.S.
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NO. ____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1984

HOU HAWAIIANS, a native Hawaiian tribe, Petitioner, vs. STATE OF HAWAII, STATE OF HAWAII DEPARTMENT OF TRANSPORTATION, a division of the State of Hawaii, STATE OF HAWAII DEPARTMENT OF BUDGET AND FINANCE, a division of the State of Hawaii, and GEORGE ARIYOSHI, in his capacity as Governor of the State of Hawaii, Defendants,	Ct. App. No. 84-2444 D.C. No. C-83-1135 HMF

PETITION FOR WRIT OF CERTIORI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

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(Certificate of Service Attached)

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PETITION FOR WRIT OF CERTIORI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

1. QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Ninth Circuit err in deciding that Petitioner or its governing body

is not "duly recognized by the Secretary of Interior" when no evidentiary hearing was held in the District Court and the District Court, in granting a motion to dismiss, assumed that HOU HAWAIIANS is 'an Indian tribe or band with a governing body duly recognized by the Secretary of Interior' within the meaning of 28 U.S.C. §1362?

2. Did the Ninth Circuit employ improper standards in determining the issue of Secetarial recognition?

3. Did the Ninth Circuit err in not remanding the appeal to the District Court for an evidentiary hearing on the issue of whether HOU HAWAIIANS or its governing body is "duly recognized by the Secretary of Interior"?

2. LISTING OF PARTIES

Chief MAUI LOA (listed as DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, Chief of the

Hou Hawaiians) and KAMUELA PRICE (a tribal representative) were Plaintiffs in the proceedings in the Federal District Court for the District of Hawaii but did not appeal the dismissal of the Amended Complaint as individuals.

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4. REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF ANY OPINIONS DELIVERED BELOW

Price v. State of Hawaii, 764 F.2d. 623 (1985).

5. STATEMENT OF JURISDICTION

Decision entered: June 25, 1985

Time of entry: 10:00 A.M.

No rehearing sought

Jurisdictional statute: 28U.S.C. 2101

6. CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

28 U.S.C. 1362, (the Indian Tribal Jurisdiction Act) which provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws or treaties of the United States.

Also involved are the following

statutes and regulations, which are included in the appendix hereto:

The Hawaii Admission Act, (especially Section 5(f)), P.L. 86-3, 73 Stat 4, 48 Prec. U.S.C. 491 (1959);

The Hawaiian Homes Commission Act of 1920, 42 Stat. 108 (1921), former 48 U.S.C. 691-716;

The Indian Reorganization Act of 1934, 25 U.S.C. 461-479;

Regulations promulgated under the Indian Reorganization Act of 1934, 25 C.F.R. 83 (1978).

7. STATEMENT OF THE CASE

a. Basis of Federal Jurisdiction in the court of first instance:

28 U.S.C. §1362 and 28 U.S.C. §1331. See Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation,

425 U.S. 463 (1976), Arizona v. San Carlos Apache Tribe of Arizona, ___ U.S. ___, 103 S.Ct. 3201 (1983).

b. Statement of the case:

i. Introduction:

This is a case of first impression in which a Native Hawaiian tribal body seek to sue the State of Hawaii, its Governor and two state agencies to compel these defendants to spend funds from the ceded land trust created by the United States Congress in admitting Hawaii as the 50th state in 1959, codified in §5(f) of the Hawaii Admission Act, P.L. 86-3, 73 Stat. 6, 48 Prec. U.S.C. §491 et.seq. 1959), to help finance the Hawaiian home land trust.

The home land trust, created by the United States Congress in the Hawaiian Homes Commission Act of 1920 ("HHCA"), 42

Stat. 108 et.seq., (1921), formerly codified at 48 U.S.C. §§691-716, is for the benefit of the Native Hawaiian peple of at least 50 percent native blood. The home lands trust was reaffirmed and perpetuated by Congress in Sections 4 and 5(f) of the Hawaii Admission Act, P.L. 86-3, 73 Stat. 4-6, 48 Prec. U.S.C. §491 et seq. (1959); its purpose is to provide lands for residence and use to Native Hawaiians, one of two beneficiary groups of the Section 5(f) ceded land trust.

Under §5(f), the United States retained the power to sue the State of Hawaii to enforce the provisions of the trust. In response to initial demands by Petitioner and its chief, Maui Loa, the United States Secretary of the Interior induced the State of Hawaii to participate in a Joint Federal-State Task Force on the Hawaiian Homes Commission Act, in which

Petitioner participated. The subsequent Report, prepared by an Interior Department official, detailed numerous trust violations and failures of the homelands program. However, the United States to date has declined to intervene or pursue independent litigation to enforce the trust.

Petitioner therefore has sought to bring this action under 28 U.S.C. §1362, which provides Federal court access to "an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior."

ii. Proceedings below:

Chief MAUI LOA and KAMUELA PRICE originally filed a complaint against the State of Hawaii and other State defendants alleging 28 U.S.C. §1331 alone as a jurisdictional basis. Defendants did not answer but instead filed a motion to dismiss

alleging, inter alia, lack of Federal subject matter jurisdiction.

Plaintiffs filed a motion to amend the complaint. In the amended complaint which accompanied their motion, plaintiffs designated Petitioner HOU HAWAIIANS as a Plaintiff, based jurisdiction on 28 U.S.C.§1362, and made certain other allegations. Plaintiffs also amended their request for relief to provide that the §5(f) funds sought in the suit be spent on the distribution of Hawaiian homestead lands to tribal members of Petitioner and other eligible native Hawaiians.

The amended complaint articulated that Petitioner "a Hawaiian ohana or tribe made up of related families of native Hawaiians of 50% or more Hawaiian ancestry, and ... the legal equivalent of a Federally recognized Indian tribe or band within the meaning of applicable Federal

law" and their Chief, Maui Loa, were suing to remedy Hawaii's breach of trust to its Native Hawaiian citizens (and to the United States). The breach of trust alleged was the State's failure to expend funds from the Section 5(f) trust for the benefit of Native Hawaiians seeking to obtain their Hawaiian home lands; their entitlement.

As relief, the amended complaint requested, inter alia, an accounting of certain §5(f) funds, a future portion of §5(f) revenues to be expended so as to enable the Hawaiian Homestead lands to be allotted to tribal members and other Native Hawaiians, and damages for past neglect in failing to properly administer the §5(f) funds.

The district court granted plaintiffs' motion to amend the complaint and continued the motion to dismiss procee-

dings. During these hearings, the district court judge orally stated that there appeared to be a disputed question of material fact as to whether Plaintiffs were "an Indian tribe or band" for purposes of §1362, and that thus it could not dismiss the case for that reason.

The district court subsequently granted defendants' motion to dismiss at a later hearing, on the basis of the 9th Circuit's previous opinion in Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 588 F.2d. 1216 (9th Cir. 1978), cert. denied 444 U.S. 826 (1979) ("Keaukaha I"), a case which did not involve §1362 and which had held, inter alia, that there was no private right of action to enforce the provisions of §5(f).

On Plaintiffs' motion for reconsideration of the district court's dismissal, the district court issued a written opin-

ion which assumed that "the Hou Hawaiians are an 'Indian tribe or band with a govern-ing body duly recognized by the Secretary of Interior" and restated the court's reliance upon Keaukaha I in dismissing the complaint.

Petitioner subsequently appealed to the United States Court of Appeals for the Ninth Circuit. [1] In their answering brief, the State defendants conceded that "the question of whether the Hou Hawaiians are an 'Indian tribe' is not an issue in this

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1. On August 14, 1985, prior to the commencement of the appeal, a different panel of the 9th Circuit than the panel that authored Keaukaha I issued its decision in Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, No. 83-2062, ___F.2d. ___ ("Keaukaha 2"). This opinion stated that the §5(f) and homelands trusts were Federal in nature and would apparently permit individual Native Hawaiians to bring claims respecting the §5(f) and Hawaiian home lands trusts in federal court under 28 U.S.C. §1983, but would disallow recovery of damages for past neglect. It should be cautioned that the Panaewa litigation involves a challenge to a land exchange by the State's Department of Hawaiian Home Lands, not the issue of funding or distribution of homelands to Native Hawaiians.

case." Oral argument took place before a three judge panel of the Ninth Circuit composed of justices different again than those justices who authored the opinions in either Keaukaha I or Keaukaha 2.

On April 18, 1985, following oral argument, but prior to the filing of its decision, the Ninth Circuit issued an order for supplemental memoranda addressing, inter alia, the following issue:

> "1) The Hou Hawaiians allege in their First Amended Complaint that they are 'the legal equivalent of a Federally recognized Indian tribe within the meaning of (28 U.S.C. §1362)." The statute does not grant jurisdiction to 'legal equivalents,' nor are the Hou Hawaiians listed by the Bureau of Indian Affairs as a tribe officially eligible to received benbefits. See 50 Fed. Reg. 6055 (1985); 48 Fed. Reg. 56, 862 (1983) Are the Hou Hawaiians an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior," 28 U.S.C §1362?

Petitioner responded by filing a

supplemental memorandum concerning the issues of tribal status and Secretarial recognition, which described certain evidence which could be introduced in an appropriate evidentiary hearing. With respect to these issues, however, Petitioner pointed out that as the appeal was from a motion to dismiss and as the trial court had assumed at that motion that Petitioner was "an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior", it would be error for the 9th Circuit to rule on this issue without ordering an evidentiary hearing in the District Court, citing this court's decision in Scheuer v. Rhodes, 416 U.S. 232 (1974).

In response to the Ninth Circuit's request, Defendants submitted significant documentary evidence, some of which had not been submitted to the District Court.

In its opinion, the Ninth Circuit assumed that Petitioner is an "Indian tribe or band" but found that "neither the Hou nor their governing body have been 'duly recognized' by the Secretary (of the Interior", thus disqualifying Petitioner from obtaining jurisdiction under 28 U.S.C. §1362.

Petitioner contends that the Ninth Circuit based its decision upon certain factual findings which were at the very least resolutions of disputed factual issues.

8. ARGUMENT

A. Reasons why Certiorari should be granted

This case directly concerns the rights of the aboriginal population of the 50th State; i.e., Native Hawaiians.

A large body of Federal law has

evolved to protect the rights of American Indians, reflecting the desire and trust responsibility of the United States to compensate the descendants of the aboriginal population whose land was taken in the development of this country. This law has been extended to protect all of the Native American groups, including Eskimos, Aleuts, and other non-ethnically Indian Alaskan Natives -- with the exception of the Native Hawaiians.

The problem of the Native Hawaiians will be a recurring one. While an enlightened Congress in 1920 set aside Federal lands for homesteads for the remaining Native Hawaiians of 50% ancestry, and while in 1959 Congress imposed the §5(f) trust responsibility upon the new State of Hawaii as a condition of statehood, the Department of the Interior has recognized

the homelands program has been a failure.[2] Despite this fact, the United States has yet declined to sue or intervene to protect the rights of the Native Hawaiian beneficiaries.

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2. The failures of the Hawaiian homelands program are too detailed to recount in this petition. Briefly, a few of the conclusions that the U.S. Department of the Interior has found are:

a. 26,000 acres have been distributed to 3,034 homesteaders as of 1981, with over 7,000 applicants on the waiting list at that time;

b. 30,000 acres of land originally set aside for the program have either been "lost" or illegally withdrawn by the State of Hawaii by governor's executive orders;

c. Considerable homestead acreage has been leased by the State to itself or non-Native Hawaiians at extremely low rentals; for example, 16,000 acres have been leased to the State's Department of Land and Natural Resources at $5 per acre per year;

d. Some beneficiaries have waited as long as 30 years to receive homesteads; many have died while on the waiting list.

(Audit report, "Review of Hawaiian Homes Commission Act Programs Operated by Department of Hawaiian Home Lands, State of Hawaii", Inspector General, U.S. Dept. of Interior, (1982); Federal State Task Force on the Hawaiian Homes Commission Act, Report to the United States Secretary of the Interior and the Governor of the State of Hawaii (1983))

Despite the need for enforcement of the trust by the Native beneficiaries themselves, the combined effect of the lower court's decisons has been to lock Petitioner out of Federal court without having given Petitioner a reasonable opportunity to prove its qualifications under 28 U.S.C. §1362; here, Secretarial recognition of its governing body.

The problem is especially acute considering the other rulings that the Ninth Circuit did make--that the §5(f) trust obligation was a Federal right (first set forth in Keaukaha 2 and reaffirmed below at page 9, Price v. State of Hawaii, appendix), that the §5(f) trust obligation was an enforcable "compact with the United States", (page 9, also reaffirming Keaukaha 2) and, by implication, that the compact incorporated "the spirit of the Hawaiian Homes Commission Act looking to

the continuance of the Hawaiian homes projects" (Id, Appendix at page 10). (That is, there are definitely substantial Federal rights involved, but no Native Hawaiian group has yet appeared who is "qualified" to enforce them.)

Without enforcement of the existing §5(f) and homelands trusts, the United States will eventually be faced with an unpleasant choice; either to abandon the Native Hawaiians entirely, or to recompensate them via enactment of a Native Claims Settlement Act. [3] The latter possibility seems somewhat of a burden to place upon Congress, who had already set aside considerable Federal acreage which was

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3. See Cohen, Handbook of Federal Indian Law, p.810, "Potential Claims", predicting that Native Hawaiians would be able to assert claims for losses based on less than "fair and honorable dealings" by the United States and other criteria were the Indian Claims Commission Act extended to them. The Handbook points out, however, that most Federal lands were granted to the State of Hawaii by the Admission Act,

supposed to be used for the benefit of Native Hawaiians.

B. Errors below:

As is pointed out in Cohen, Handbook of Federal Indian Law, 2nd. Ed., the concepts of "tribes" and "recognition" have different meanings depending upon the context of the statute or regulation examined:

> "Although there is broad federal authority to recognize tribes, the question may arise whether that power has been exercised in a particular instance. Normally a group will be treated as a tribe or a "recognized" tribe if (a) Congress or the Executive has created a reservation for the group by treaty, agreement, statute, executive order, or valid administrative action; and (b) the United States has some continuing political relationship with the group, such as providing services through the Bureau of Indian Affairs. Accordingly, reservation tribes with continuing federal contact are considered tribes under virtually every statute that refers to Indian tribes.

> Not all tribes have been recognized in this manner, however. The United States has not established reservations for some tribes. In some cases the United States has treated with a tribe, but federal officials have failed to provide services and assistance to the same extent as with other tribes. In still other cases, Congress has terminated part, through not necessarily all, of the federal-tribal relationship.
>
> In those situations where the tribal status of an Indian group is in doubt, it is necessary to examine the language and intent of the specific statute which defines rights and responsibilities in the particular situation. A study of those statutes reveals that tribes cannot be neatly divided into "recognized" and "nonrecognized" tribes for all purposes; rather, a tribe may "exist" for some purposes but not for others. (Id. at pp. 6-7)

With regard to 28 U.S.C. §1362, the Handbook states:

> "Federal district courts are vested with original jurisdiction of civil actions 'brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior.' This statute does not include the

> normal jurisdictional requirement of a $10,000 amount in controversy in federal question cases. The requirement of secretarial recognition relates to the governing body of the tribe, not to tribal existence. Although the question has never been decided, it appears that the statute does not cover tribes or bands with no recognized governing body. Also, in cases where more than one body asserts governing authority over a tribe, it is only the group recognized as the governing body by the Secretary which can sue under the section. Evidence of secretarial recognition can be found through dealings such as contracts with the governing body or through certification of an election by the Secretary under the Indian Reorganization Act." Id. at 17.

Case law concerning the definition of "tribe", "band" and "recognition" under §1362 is sparse. In Navajo Tribal Utility Authority v. Arizona Department of Revenue, 608 F.2d. 1228 (9th Cir. 1979), one of the few cases where the Plaintiff was found not to be a tribe, the 9th Circuit appeared concerned that the

action, brought by a tribal utility authority with non-Indians on its board of directors, might not reflect the true desires of the Navajo tribe itself, which existed and could bring a similar action if it wished. But this is a far cry from determining that no recognized governing body exists to sue, as was done in the instant case.

If, as the Handbook on Federal Law suggests, a governing body can be recognized through Interior's "dealings" with the governing body as such, there is certainly enough evidence of the Secretary's "dealings" with the governing body on the record to warrant a full evidentiary hearing concerning this issue.

The most significant act of Secretarial recognition of Petitioner's governing body was the formation of the Federal-State Task Force on the Hawaiian

Homes Commission Act. In December of 1980, Interior Secretary Cecil D. Andrus proposed formation of the Task Force to Hawaii Governor Ariyoshi, a defendant-appellee herein:

> "Because of the Keaukaha case [Keaukaha 1] and the March 17 [1980] request [of the Hou Hawaiians, Chief Maui Loa, and other Native Hawaiians] we have undertaken a comprehensive review of the HHCA and conclude that serious violations of a number of aspects of the Act have occurred." (Letter from Secretary Andrus to Governor Ariyoshi, December 3, 1980)

This followed delivery of the March 17 letter from Petitioner, Chief Maui Loa and other Native Hawaiians requesting that the Secretary exercise his discretion under the HHCA to enforce the homelands trust, and a related action brought by Petitioner and Maui Loa to require the Department of Justice to enforce the trust.

Following formation of the Task Force and the meetings and deliberations of that body (to which a representative of Petitioner was appointed) a report issued, written by a Department of Interior employee, Ms. Cecil S. Hoffman, which expressly credited Petitioner for triggering Secretary Andrus' letter and the creation of the Task Force and expressly described Maui Loa as Petitioner's Chief.

Petitioner has also received grants in fiscal years 1984 and 1985 from the Administration for Native Americans (a division of the U.S. Department of Health and Human Services) of approximately $242,000 for development of an agricultural training project for Native Hawaiians. In connection with this grant, Interior's Bureau of Indian Affairs has provided auditing services to Petitioner

through the Administration for Native Americans, and the Interior Department and other Federal agencies have had continuous contact with Petitioner and Chief Maui Loa regarding the project and other matters.

The Ninth Circuit primarily relied upon the stringent requirements of the Indian Reorganization Act, (25 U.S.C. 461-479) in deciding that Petitioner and/or its governing body had not been properly recognized by the Secretary of the Interior. Recognition under this statute, of course, carries with it not merely access to Federal Court but a multitude of services from the Bureau of Indian Affairs for the tribe so recognized. Petitioner is aware of no authority which requires that a tribe or band's governing body be "recognized" pursuant to the Indian Reorganization Act and the Ninth Circuit's opinion in this regard did not cite any.

In relying upon the Indian Reorganization Act, the Ninth Circuit made several errors; for instance, it found as a fact that "the Hou ohana was founded in 1974" (Id, appendix at p.7) when that date was merely the date that formal association papers were written and despite Petitioner's claims that, as an ohana, it had been in existence since the 19th century. More seriously, the 9th Circuit placed some credence in geographical residence requirements for recognition (Id, appendix at p.7), a rather unreasonable requirement considering that Native Hawaiians have been excluded from the Hawaiian homelands.

The Ninth Circuit concludes its discussion of the "recognition" issue by turning the traditional rule of court deference to an Executive or Legislative determination of tribal existence on its

head and "deferring" to a supposed determination of tribal non-existence! Id, appendix at p. 8. The rule, as set forth in the Handbook on Federal Indian Law , pp. 6-8, and the cited cases, is one of "judicial deference to findings of tribal existence". The converse is not necessarily true! See, e.g., Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d. 370 (1st. Cir. 1975).

Of course, that portion of the opinion is largely rhetorical, but does indicate that the panel did not fully appreciate the issues involved.

c. Conclusion:

To Petitioner's knowledge, the issue of what constitutes Secretarial "recognition" under 28 U.S.C. §1362 is one that has not been addressed before. The meaning of the term "tribe" or "band" in

28 U.S.C. §1362 has been very rarely addressed.

Given the fact that this question had not been addressed before, the 9th Circuit should not have decided the appeal upon the inadequate factual record which was before it, namely, an appeal from a motion to dismiss where Petitioner's status as "an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior" was assumed. Such evidence on the record before the 9th Circuit indicated that the Secretary was dealing with Petitioner as if its governing body had been recognized. Petitioner should have been granted an evidentiary hearing at which to present whatever evidence it had concerning these issues before the 9th Circuit adopted a rule which might well exclude any Native Hawaiian group from access to Federal Court to secure its

rights under §5(f) and the Hawaiian Homes Commission Act.

DATED: Honolulu, Hawaii, September 23, 1985.

PAUL McCARTHY
Attorney for Petitioner

APPENDIX

1. Order Granting Motion to Dismiss, in Price v. State of Hawaii, Civil No. 83-1135, entered April 12, 1984

2. Order Denying Motion for Reconsideration of Order Granting Motion to Dismiss, in Price v. State of Hawaii, Civil No. 83-1135, entered August 6, 1984

3. Order by Ninth Circuit for Supplemental Memoranda dated April 8, 1985

4 Decision in Price v. State of Hawaii, No. 84-2444, June 25, 1985 (also reported at 764 F.2d. 623

5. Hawaii Statehood Admissions Act

6. Hawaiian Homes Commission Act

7. Indian Reorganization Act

8. Regulations promulgated under Indian Reorganization Act

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

DOCTOR NUI LOA PRICE, aka MAUI LOA, individually and in his capacity as ancestral chief of the Hou Hawaiians, and KAMUELA PRICE, individually and on behalf of the Hou Hawaiians, and the HOU HAWAIIANS, a native Hawaiian tribe, Plaintiffs, vs. STATE OF HAWAII, STATE OF HAWAII DEPARTMENT OF TRANSPORTATION, a division of the State of Hawaii, STATE OF HAWAII DEPARTMENT OF BUDGET AND FINANCE, a division of the State of Hawaii, and GEORGE ARIYOSHI, in his capacity as Governor of the State of Hawaii, Defendants.	CIVIL NO. 83-1135 ORDER GRANTING MOTION TO DISMISS

ORDER GRANTING MOTION TO DISMISS

Defendant's Motion to Dismiss the First Amended Complaint, having come on

for hearing before he Honorable Harold M.Fong on March 19, 1984, the court having examined the memoranda filed in this case, and having heard oral argument presented by counsel, and being fully apprised in the premises therein, finds as follows:

The Ninth Circuit's decision in Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, et.al., 588 F.2d. 1216 (9th Cir. 1978), cert. denied, 444 U.S. 826 (1979) is dispositive of the jurisdictional issue raised in defendant's Motion to Dismiss the First Amended Complaint.

Accordingly, IT IS HEREBY ORDERED that the Motion to Dismiss the First Amended Complaint is GRANTED.

DATED: Honolulu, Hawaii, April 12, 1984.

/s/HAROLD M. FONG
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

DOCTOR NUI LOA PRICE, aka MAUI LOA, individually and in his capacity as ancestral chief of the Hou Hawaiians, and KAMUELA PRICE, individually and on behalf of the Hou Hawaiians, and the HOU HAWAIIANS, a native Hawaiian tribe, Plaintiffs, vs. STATE OF HAWAII, STATE OF HAWAII DEPARTMENT OF TRANSPORTATION, a division of the State of Hawaii, STATE OF HAWAII DEPARTMENT OF BUDGET AND FINANCE, a division of the State of Hawaii, and GEORGE ARIYOSHI, in his capacity as Governor of the State of Hawaii, Defendants.	CIVIL NO. 83-1135 ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER GRANTING MOTION TO DISMISS

ORDER GRANTING MOTION FOR RECONSIDERATION OF ORDER GRANTING MOTION TO DISMISS

Defendants having filed a Motion for Reconsideration of this court's Order

Granting Motion to Dismiss, the court having examined the memoranda filed in this case, and being fully apprised of the premises therein, finds as follows:

This court previously dismissed the plaintiffs' claims on the authority of Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, et.al., 588 F.2d. 216 (9th Cir. 1978), cert. denied, 444 U.S. 826 (1979).

The plaintiffs admit that the issue of this court's federal question jurisdiction over the Commission Act claims was directly addressed by the Ninth Circuit in Keaukaha-Panaewa. Thus, the case is dispositive on their Commission Act claims, over which this court has no subject matter jurisdiction. However, plaintiffs argue that Keaukaha-Panaewa is not dispositive of their Admission Act claims. Plaintiffs argue that their right

to a federal cause of action under a §1362 "co-plaintiff" theory was not addressed by that case.

Plaintiffs assert that this case is distinguishable from Keaukaha-Panaewa because the plaintiffs in that case were suing as individuals, rather than as a "tribe or band" entitled to sue in federal court under 28 U.S.C. §1362. The plaintiffs argue that §1362, which was unavailable to the plaintiffs in Keaukaha-Panaewa, confers a federal cause of action in this case.

Section 1362 states:

> The district courts shall have original jurisdiction of all civil action, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws or treaties of the United States.

The plaintiffs argue that this is a

suit brought by "an entity which claims to be an Indian tribe or band."

Assuming in arguendo, that the Hou Hawaiians are an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior," and that Doctor and Kamuela Price are representatives of that entity, authorized to bring suit on behalf of the tribe, the claim on the part of the Hou Hawaiians must fail for the reasons discussed below.

Plaintiffs argue that §1362 confers a federal cause of action upon Indian tribes under the "co-plaintiff" doctrine recognized in Moe v. Confederated Salish and Kootenai Tribes, etc., 425 U.S. 463 (1976). In Moe, the Supreme Court considered the legislative history of §1362, and stated that:

> [W]e find an indication of a congressional purpose to open the federal courts to the kind of

> claims that could have been brought by the United States as trustee, but for whatever reason were not so brought. . . . While this is hardly an unequivocal statement of intent to allow such litigation to proceed irrespective of other explicity (sic) jurisdictional limitations, . . . it would appear that Congress contemplated that a tribe's access to federal court to litigate a matter arising "under the Constitution, laws or treaties" would be at least in some respects as broad as that of the United States in suing as the tribe's trustee.

Id. at 472-72 [emphasis added].

The Keaukaha-Panaewa court discussed the existence of a federal private Admission Act cause of action under the "co-plaintiff" doctrine, stating that:

> Plaintiffs contend that, as native Hawaiians, they should receive the benefit of cases that have allowed native Americans a private federal right of actikon where the United States, as trustee, could sue in federal district court to protect the native Americans' rights with regard to trust lands. See, e.g., Aqua Caliente Band of Mission Indians v. County of

Riverside, 442 F.2d. 1184, 1186 (9th Cir. 1971), cert denied, 405 U.S. 933, 92 S.Ct. 930, 30 L.Ed. 2d. 1238 (1971). We developed this "co-pliantiff"(sic) doctrine in reliance upon Poafpitty b. Skelly Oil Co., 390 U.S. 365, 366-72, 88 S.Ct. 982, 19 L.Ed.2d 1238 (1968), which held that "[a]n Indian, as the beneficial owner of lands held by the United States in trust has a right action (sic) independently of the United States to sue to protect his property interests." Agua Caliente Band of Mission Indians v. County of Riverside, supra, 442 F.2d. at 1186 (emphasis added)(footnote ommitted.(sic))

The argument in favor of a private right of action in federal court pursuant to the "co-plaintiff" doctrine is of less force in the situation before us. The factual circumstances underlying the line of cases establishing this doctrine generally involve native Americans, as plaintiffs, suing a state or other entity to protect their rights in trust property, where the United States is trustee of the lands. In this case, however, the state is the trustee, the native hawaiians are attempting to sue the state for breach of the state's trust obligations, and the United States has to opportunity to sue the state only on the basis of a

> right reserved by Congress in the state's Admission Act. The United States has only a somewhat tangential role under the Admission Act, rather than the role of trustee.

Panaewa at 1224 n. 7.

Plaintiffs argue that the Poafpitty "co-plaintiff" doctrine, discussed in Keaukaha-Panaewa is legally distinguishable from the co-plaintiff theory adopted in Moe v. Confederated Salish & Kootenai Tribes, etc., 425 U.S. 463 (1976) because the Moe version of that doctrine is based on §1362, rather than §1331 jurisdiction. This court does not find the plaintiffs' argument persuasive. It is clear that the co-plaintiff doctrine recognized in Moe is also derived from the United States' right to sue as trustee of the lands. Thus, the language in Keaukaha-Panaewa rejecting the application of the co-plaintiff doctrine is equally applicable in this case where

the plaintiffs are attempting to sue as co-plaintiffs under §1362.

As stated in Keaukaha-Panaewa, the state is the trustee of the trust lands conveyed by the Admission Act. The United States' role under the Admission Act is not that of trustee, but a more tangential one based on a reserved right to sue the state for breach of its trust obligations. Thus, under reasoning of Keaukaha-Panaewa, the "co-plaintiff" doctrine -- under either §1331 or §1362 -- does not operate to confer a federal cause of action in this case.

It must also be noted that this suit is brought by Doctor Nui Loa Price, a.k.a. Maui Loa, "individually and in his capacity as ancestral chief of the Hou Hawaiians," Kamuela Price, "individually, and on behalf of the Hou Hawaiians," and the Hou Hawaiians, a native Hawaiian

tribe. To the extent that this complaint is brought by Maui Loa and Kamuela Price in their individual capacities, §1362 is controlling as to their situation.

For the foregoing reasons, IT IS HEREBY ORDERED that the Motion for Reconsideration of the Order Granting the Motion to Dismiss is DENIED.

DATED: Honolulu, Hawaii, August 6, 1984.

/s/ HAROLD M. FONG
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, KAMUELA PRICE, and the HOU HAWAIIANS, Plaintiffs-Appellants,	
vs.	C.A. No. 84-2444
STATE OF HAWAII, STATE OF HAWAII DEPARTMENT OF TRANSPORTATION, STATE OF HAWAII DEPARTMENT OF BUDGET AND FINANCE, and GEORGE ARIYOSHI, Governor, Defendants-Appellees.	DC# CV 83-1135 Hawaii

Before: FARRIS, PREGERSON and BEEZER, Circuit Judges

IT IS ORDERED that within ten working days of the date of this order, counsel for both sides are ordered to submit simultaneous supplemental memoranda addressing the following issues:

1) The Hou Hawaiians allege in their

First Amended Complaint that they are "the legal equivalent of a recognized Indian tribe within the meaning of (28 U.S.C. §1362)." The statute does not grant jurisdiction to "legal equivalents," nor are the Hou Hawaiians listed by the bureau of Indian Affairs as a tribe officially eligible to received (sic) benefits. See 50 Fed. Reg. 6055 (1985); 48 Fed. Reg. 56, 862 (1983). Are the Hou Hawaiians an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior," 28 U.S.C. §1362?

2) On what basis can this court imply a private cause of action for the Hou Hawaiians to enforce the Admission Act, when Keaukaha-Panaewa Community Assoc. v. Hawaiian Homes Commission, 588 F.2d. 1216 (9th Cir. 1978), cert. denied, 444 U.S. 826 (1979), holds that Congress did not intend individual native Hawaiians

to have a private cause of action? Note that 28 U.S.C. §1362 is a general jurisdiction statute, and at least facially does not authorize a cause of action.

FOR THE COURT:

PHILLIP B. WINBERRY,
Clerk of Court

/s/ Vivienne L. Thompson

By: Vivienne L. Thompson,
Deputy Clerk

April 8, 1985

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, individually and in his capacity as ancestral chief of the Hou Hawaiians, and KAMUELA PRICE, etc.,

Plaintiffs,

and

HOU HAWAIIANS, a Native Hawaii tribe,

Plaintiffs-Appellants,

v.

STATE OF HAWAII, STATE OF HAWAII DEPARTMENT OF TRANSPORTATION, a division of the State of Hawaii, STATE OF HAWAII DEPARTMENT OF BUDGET AND FINANCE, division of the State of Hawaii, and GEORGE ARIYOSHI, in his capacity as Governor of the State of Hawaii,

Defendants-Appellees.

No. 84-2444

D.C. No. C 83-1135 HMF

OPINION

Argued and Submitted
April 4, 1985—Honolulu, Hawaii

Filed June 25, 1985

Before: Jerome Farris, Harry Pregerson, and Robert R. Beezer, Circuit Judges.

Opinion by Judge Farris

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, District Judge, Presiding

SUMMARY

Courts and Procedure/Indians

Appeal from judgment dismissing complaint for lack of federal subject matter jurisdiction. Affirmed.

The Hou Hawaiian tribal body sought to compel the state to apply the proceeds from a land trust created in the state by the federal government when Hawaii was admitted into the Union in 1959, to the benefit of native Hawaiians. The land was part of the Hawaiian Home Lands Trust created in 1920 to provide lands for the use and benefit of Hawaiian people of at least 50% native blood. When the land was transferred to the state it was to be held as a public trust and its proceeds used for "one or more" of five statutory purposes, one of which is the betterment of the conditions of native Hawaiians. The Hou sued in federal court alleging the state had breached its trust by failing to expend any of the funds for that purpose. The district court granted the state's motion to dismiss on grounds that the court lacked subject matter jurisdiction. After the U.S. Secretary of the Interior notified the Hou that it would not intervene, the court rejected the Hou argument that *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 739 F.2d 1467 (9th Cir. 1984) (*Keaukaha II*) affected the jurisdictional issue and refused to grant a motion for reconsideration.

[1] The Hou do not qualify for jurisdiction under 28 U.S.C. § 1362 as an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior" because neither the Hou or their governing body have been so recognized. [2] The Hou fail to achieve tribal status under statutes governing tribal recognition, [3] regulations of the Bureau of Indian Affairs, [4] or other factors for determining tribal recognition.

[5] The Hou did properly invoke federal question jurisdiction under 42 U.S.C. § 1983 and *Keaukaha II* by raising issues concerning the trust obligation which are rooted in federal law, [6] but the state did not waive its sovereign immunity, so the suit is

barred by the Eleventh Amendment. [7] While the Eleventh Amendment does not bar the Hou from bringing an action against the governor of Hawaii for prospective injunctive relief, [8] (and the Hou have standing to seek such relief) [9] the Hou do not have a private cause of action under the Admission Act, and therefore cannot bring an action against the governor, either.

COUNSEL

Paul McCarthy, Honolulu, Hawaii, for the plaintiffs-appellants.

Charlotte Libman, Honolulu, Hawaii, for the defendants-appellees.

OPINION

FARRIS, Circuit Judge:

A native Hawaiian tribal body seeks to compel the State of Hawaii to apply the proceeds from a congressionally created land trust to finance the distribution of land for the benefit of native Hawaiians. The Hou Hawaiian tribe appeals the judgment of the U.S. district court for Hawaii, Fong, J., which dismissed their complaint for lack of federal subject matter jurisdiction.

In 1920, Congress created the Hawaiian Home Lands Trust to provide lands for the use and bene[illegible] of native Hawaiian people of at least 50 percent native blood. *See* Hawaiian Homes Commission Act of 1920, Pub. L. No. 67-34, 42 Stat. 108 et seq. (1921). The Home Lands Trust was incorporated into the Constitution of the State of Hawaii when Congress admitted the State into the Union in 1959. *See* Hawaii Admission Act, P.L. No. 86-3, § 4, 73 Stat. 4, 5 (1959).

Under section 5(f) of the Admission Act, the United States conveyed the bulk of its Hawaiian land holdings to the newly

formed State, with the instruction that the lands and all property subsequently conveyed by the United States to the State be held by the State as a public trust. The lands which had already been reserved for disposition by the Hawaiian Homes Commission under the 1920 Act were included in the section 5(f) trust.

Proceeds from the section 5(f) trust are to be devoted to "one or more" of five statutory purposes, one of which is "for the betterment of the conditions of native Hawaiians." 73 Stat. 6. Section 5(f) places no other express limitations on the State's use of the trust fund proceeds.

The Hou Hawaiians sued in federal district court alleging that the State of Hawaii had breached its trust obligations to the United States and to the native Hawaiians by failing to expend any section 5(f) funds "for the betterment of the conditions of native Hawaiians." The Hou also alleged that the State was spending section 5(f) funds on "the maintenance of the State of Hawaii governmental structure," a purpose not authorized by the statute. The Hou requested an accounting of all section 5(f) lands; "just and fair" compensation for the State's prior neglect and a "just and fair portion" of future revenues produced by section 5(f) lands; and the use of the award to secure matching federal funds to implement the Hawaiian Homes Commission Act.

The district court granted the State's motion to dismiss, on the ground that our decision in *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission,* 588 F.2d 1216 (9th Cir. 1978), *cert. denied,* 444 U.S. 826 (1979) ("*Keaukaha I*"), compelled a finding that the district court lacked subject matter jurisdiction over the Hous' suit.

Following the dismissal, the United States Secretary of the Interior notified the Hou that it would not intervene in the action at this point. The district court subsequently denied the Hous' Motion for Reconsideration, rejecting the Hous' argument that *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission,* 739 F.2d 1467 (9th Cir. 1984) ("*Keaukaha II*"), affected the jurisdictional issue. The Hou timely appeal; we have jurisdiction under 28 U.S.C. § 1291.

I. *Do the Hou qualify for § 1362 jurisdiction?*

[1] In both their Opening Brief and extensive supplemental briefing submitted at our request, the Hou contend that they are an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior," 28 U.S.C. § 1362, and hence may bring this suit under § 1362. Because neither the Hou nor their governing body have been "duly recognized" by the Secretary, they do not qualify for § 1362 jurisdiction even if we assume that they are an "Indian tribe or band."

A. Statutes governing tribal recognition.

No statute explicitly details the procedure by which a tribe may become "duly recognized by the Secretary" for purposes of establishing § 1362 jurisdiction. We note, however, that the Secretary must approve the organization or incorporation of a tribe. If the Hou had been formally organized or incorporated as a tribe, they could thus argue that they had been "duly recognized."

The statutes governing the formal organization and incorporation of an Indian tribe, *see* 25 U.S.C. §§ 476-477, explicitly do not apply to "any of the Territories, colonies, or insular possessions of the United States [except for] the Territory of Alaska." 25 U.S.C. § 473. In 1934, when § 473 was enacted, Hawaii was such a territory. Therefore, Congress did not originally intend the statutes governing the organization of new Indian tribes to apply to aboriginal groups in Hawaii.

[2] Even if we assume that §§ 476-477 do apply to Hawaii today because it is now a State, the Hou have neither 1) adopted a constitution and bylaws ratified by majority vote of the adult members of the tribe and approved by the Secretary of the Interior, as required by § 476, nor 2) received a charter of incorporation, pursuant to § 477. Therefore, neither provision provides support for a claim of "recognition by the Secretary of the Interior."

B. Regulations governing tribal recognition.

[3] Nor can the Hou claim "recognition" under the regulations by which the Interior Department's Bureau of Indian Affairs acknowledges tribal existence. *See* 25 C.F.R. Part 83 (1984). The regulations establish tribal existence as "a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes. Such acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes . . . ." 25 C.F.R. § 83.2. However, the regulations are explicitly limited to "only those American Indian groups indigenous to the continental United States . . . ." 25 C.F.R. § 83.3(a). The Hou Hawaiians acknowledge that they have not been "recognized" under these regulations.

C. Factors for determining tribal recognition.

Although no statute or regulation governs recognition of the Hou for purposes of establishing § 1362 jurisdiction, we conclude that the same factors which govern eligibility for federal benefits and "immunities and privileges," *see* 25 C.F.R. § 83.7, also provide some guidance for the jurisdictional inquiry. These factors, however, do not demonstrate that the Hou or their "governing body" have been "duly recognized" for § 1362 purposes.

1. Historical continuity.

We first examine whether the group petitioning for recognition "has been identified from historical times until the present on a substantially continuous basis, as 'American Indian,' or 'aboriginal.' " 25 C.F.R. § 83.7(a). The importance of a tribe's longstanding existence is underscored by the regulations' exclusion of "associations, organizations, corporations or groups of any character, formed in recent times," 25 C.F.R. § 83.3(c), from eligibility for Bureau of Indian Affairs benefits.

Although native Hawaiians *in general* may be able to assert a longstanding aboriginal history, the issue before us is whether the

particular subgroup seeking recognition—the Hou Hawaiians—can establish that they are a longstanding aboriginal sovereign rather than a recently formed association. To allow any group of persons to "bootstrap" themselves into formal "tribal" status—thereby obtaining the federal economic and legal benefits attendant upon tribal status—simply because they are all members of a larger aboriginal ethnic body would be to ignore the concept of "tribe" as a distinct sovereignty set apart by historical and ethnological boundaries. *Cf.* F. Cohen, *Handbook of Federal Indian Law* 5 & n.17, 229 (1982). Because the Hou *ohana* was founded in 1974, it does not satisfy the historical requirement for tribal status implicit in § 83.7(a).

2. Longstanding tribal political authority.

The BIA regulations also consider whether "the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present." 25 C.F.R. § 83.7(c). The Hou have alleged no facts indicating longstanding actual political authority over its members. To contrary effect, the Hou have submitted "Minutes of a General Meeting of the Elder Council" that indicate that their Chief and Elder Council were *first* elected on *January 27, 1985.* This recent election was apparently prompted by the Department of Health and Human Services' request that the Hou formalize their political trappings in order for them to obtain Health and Human Services' benefits.

3. Other factors considered in BIA regulations.

The Hou have not alleged that "a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area . . . ." 25 C.F.R. § 83.7(b). Nor have they alleged that their members obey certain formal "procedures through which the group currently governs its affairs and its members," 25 C.F.R. § 83.7(d).

D. Non-statutory standards for determining tribal recognition.

Apart from the BIA regulations, we are also guided by a 1974 letter from the Commissioner of Indian Affairs to the Chairman of the Senate Committee on Interior and Insular Affairs, in which the BIA reviewed its policies of recognizing Indian tribes over the previous twenty years. The letter describes five factors that the BIA used prior to the 1978 promulgation of the regulations discussed above, *see* 25 C.F.R. Part 83, in determining eligibility for BIA benefits.

[4] The Hou fail to satisfy at least four of these five factors. The Hou 1) have not had treaty relations with the United States; 2) have not been denominated a tribe by act of Congress or Executive order; 3) have not been treated as a tribe by other Indian tribes;[1] and 4) have not demonstrated that the tribe exercises political authority over its members. It is unclear from the record whether the Hou share collective rights in tribal lands or funds, the fifth factor employed by the BIA.

In summary, under both the BIA's current regulations for determining eligibility for federal benefits and "privileges and immunities," *see* 25 C.F.R. § 83.7, and the BIA's pre-regulation standard for recognizing a tribe, the Hou fail to demonstrate eligibility for recognition. In the absence of explicit governing statutes or regulations, we will not intrude on the traditionally executive or legislative prerogative of recognizing a tribe's existence. *See United States v. Sandoval*, 231 U.S. 28, 46 (1913) (recognition of tribe is "to be determined by Congress, and not by the courts"); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865); F. Cohen, *Handbook of Federal Indian Law* 4-5 (1982). We therefore hold that the Hou do not qualify for § 1362 jurisdiction.

[1] Although the Hou argue that they have been treated as a tribe by "the larger, federally recognized tribe of the Native Hawaiian people as a whole," the Hou have not shown that the Native Hawaiian people have themselves been "duly recognized" as a tribe.

II. *Federal question jurisdiction.*

The Hou also assert jurisdiction under 28 U.S.C. § 1331. "For this case to be within the purview of § 1331(a), a right or immunity created by the Constitution or laws of the United States must be an essential element of plaintiffs' claim." *League to Save Lake Tahoe v. Tahoe Regional Planning Agency,* 507 F.2d 517, 519 (9th Cir. 1974), *cert. denied,* 420 U.S. 974 (1975).

[5] We have recently held that § 5(f) of the Admission Act creates a federal "right" enforceable under 42 U.S.C. § 1983. *Keaukaha II,* 739 F.2d at 1472. The Act's trust obligation is "rooted in federal law, and power to enforce that obligation is contained in federal law, *see Keaukaha I,* 588 F.2d at 1218. Congress imposed the trust obligation as a condition of statehood and as a 'compact with the United States.' § 4, 73 Stat. 4." *Keaukaha II,* 739 F.2d at 1472. Under *Keaukaha II,* the Hou have properly invoked federal question jurisdiction.

The Hous' § 1331 jurisdiction alternatively rests on our holding in *Keaukaha II* that § 5(f) of the Admissions Act imposes a trust obligation that constitutes a "compact with the United States." *See* 739 F.2d at 1472; *but cf. Keaukaha I,* 588 F.2d at 1227 n.12 (the Commission Act has not been incorporated as a federal-state compact). Unlike typical provisions of state law, this trust obligation is expressly protected from any amendments by the State legislature unless the United States has consented to those amendments. § 4, 73 Stat. 5; § 15, 73 Stat. 11. The terms of this federal-state compact, which has been recently reaffirmed by the Hawaii Supreme Court, *see Ahuna v. Department of Hawaiian Home Lands,* 64 Hawaii 327, 640 P.2d 1161, 1168 (1982), have been set forth in the plain language of the Hawaii State Constitution. *See* Hawaii Const., art. XII, § 2 (1978).

"[A] case involving the construction of an *interstate* compact which requires a judicial determination of the nature and scope of obligations set forth therein 'arises' under the 'laws' of the United States within the meaning of § 1331(a)." *League to Save Lake Tahoe v. Tahoe Regional Planning Agency,* 507 F.2d at

522 (emphasis added) (footnote omitted); *see also Petty v. Tennessee-Missouri Bridge Comm'n,* 359 U.S. 275, 278 (1959); *League to Save Lake Tahoe v. B.J.K. Corporation,* 547 F.2d 1072, 1073 (9th Cir. 1976); Comment, Federal Question Jurisdiction to Interpret Interstate Compacts, 64 *Geo. L.J.* 87 (1975). Because a compact between two states "deriv[es] its authority from powers conferred upon Congress," *Jacobson v. Tahoe Regional Planning Agency,* 566 F.2d 1353, 1359 (9th Cir. 1977), *aff'd in part, rev'd in part on other grounds sub nom. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391 (1979), and has been arrived at only through the consent of Congress, *see* U.S. Const., art. 1, § 10 cl.3, the enforcement of an interstate compact may properly be sought in federal court. 566 F.2d at 1358 (citing *League to Save Tahoe,* 507 F.2d at 523 & n.13).

Congress' role in the formation of a compact between the United States and a State is at least as great as Congress' role in approving a compact between two States. In addition, federal law is "an essential element" of a suit that charges a violation of a compact incorporating "the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects." Hawaii Const., art. XII, § 2; art. XII, § 4; art. XVI, § 7; *see Keaukaha II,* 739 F.2d at 1472. We therefore hold that the enforcement of the § 5(f) compact presents a federal question under 28 U.S.C. § 1331(a).

III. *Sovereign immunity.*

A. Claims against the State.

[6] The State of Hawaii argues that it has not waived its sovereign immunity, and hence this suit is barred by the Eleventh Amendment. "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " *Edelman v. Jordan,* 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Dis-*

tilling Co., 213 U.S. 151, 171 (1909)); *see Pennhurst State School & Hospital v. Halderman*, _U.S._, 104 S. Ct. 900, 907 (1984) ("Pennhurst II").

Although the text of the Admission Act unmistakably authorizes the United States to bring suit against the State, we find no express language or legislative history proving that the State has lost its sovereign immunity from suit by the Hou. The Hous' claims against the State of Hawaii, its Department of Transportation, and its Department of Budget and Finance are therefore dismissed. *See Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1173 & n.5 (9th Cir. 1984).

B. Claims against George Ariyoshi.

The Hou have also named George Ariyoshi, in his capacity as governor of Hawaii, as a defendant in this suit. The Supreme Court has recently reaffirmed that "when a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct, [although] not one that awards retroactive monetary relief." *Pennhurst II*, 104 S. Ct. at 909 (citing *Edelman v. Jordan*, 415 U.S. at 666-67); *see Hoohuli v. Ariyoshi*, 741 F.2d at 1174. Because the Hou have alleged a violation of the Admission Act and its incorporation of the federal-state compact to preserve "the spirit of the Hawaiian Homes Commission Act," *see* Hawaii Const., art. XII § 2, they have alleged a violation of federal law, *see* discussion *supra* section II; *Keaukaha II*, 739 F.2d at 1472, and may properly seek prospective injunctive relief in federal court.

[7] We reject the argument that all relief, both retroactive and prospective, will ultimately be paid by the State and hence is barred by the Eleventh Amendment. While we agree that the Eleventh Amendment bars a request for retroactive damages, *see Pennhurst II*, 104 S. Ct. at 911 (citing *Edelman*, 415 U.S. at 665); *Hoohuli v. Ariyoshi*, 741 F.2d at 1174, we view the effect on the Hawaii State treasury of the requested injunctive relief as "the necessary result of compliance with decrees which by their

terms [are] prospective in nature . . . [and] an inevitable consequence of the principle announced in *Ex parte Young.*" *Edelman,* 415 U.S. at 667-68, 677 (permitting prospective injunctive relief in a § 1983 action brought by public aid recipients), and discussing *Graham v. Richardson,* 403 U.S. 365 (1971) (Eleventh Amendment does not bar federal court from enjoining state officials who were denying welfare benefits to otherwise qualified aliens); *Goldberg v. Kelly,* 397 U.S. 254 (1970) (enjoining termination of welfare payments without prior hearing). We therefore hold that the Hou may properly seek prospective injunctive relief against George Ariyoshi in his capacity as governor. We make no comment on the merits of such an action.

IV. *Standing.*

To establish standing, a plaintiff must allege personal injury that is "fairly traceable" to the defendant's conduct and "likely to be redressed by the requested relief." *Allen v. Wright,* 104 S. Ct. 3315, 3325 (1984) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982)).

The Hou have suffered an economic injury that can be "fairly traced" to the State's decision to fund other purposes than section 5(f)'s "the betterment of the conditions of native Hawaiians." Such an injury is analogous to competitors' injuries in a long line of Supreme Court cases that have upheld standing to challenge regulatory benefits and licenses granted by the government to competitor companies. *See e.g., Investment Co. Institute v. Camp,* 401 U.S. 617 (1971); *Arnold Tours, Inc. v. Camp,* 400 U.S. 45 (1970) (per curiam); *American Trucking Ass'ns, Inc. v. United States,* 364 U.S. 1 (1960); *see generally* 4K. Davis, Administrative Law § 24:13 (2d Ed. 1983). The Hou have "credibly allege[d]" a realistic threat from the future administration of the section 5(f) trust. *See Los Angeles v. Lyons,* 461 U.S. 95, 107 n.7 (1983).

It is also clear that the Hous' economic injury would be "likely" to be redressed, *see Allen v. Wright,* 104 S. Ct. at 3325.

(citing *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 (1976)), if we enjoined Governor Ariyoshi from allowing executive agencies to continue to expend trust funds in the manner alleged by the Hou.

Because the Admission Act broadly allows the State to expend trust funds on "one or more" of five statutory purposes, however, the State argues that it has acted well within its discretion in refusing to grant any funds at all to the Hou. Therefore, the State concludes that the Hou have no right to any trust funds, and they cannot claim an "injury in fact" sufficient to satisfy Article III standing requirements.

[8] The State's argument would require the Hou to establish a formal legally protected right, rather than an economic interest which has been arguably affected by the State, merely to get into court. Such a "legal interest" test was replaced in the 1970's by the more lenient "injury in fact" test. *See Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970).[2] Therefore, for purposes of determining standing, we reject the State's invitation to examine whether the Admission Act gives the Hou a legally protected right to trust funds. We hold that the Hou have standing to seek prospective injunctive relief against Governor Ariyoshi.

V. *Implied private cause of action.*

We now consider whether the Hou may bring a private cause of action under the Admission Act.

Under the "co-plaintiff" doctrine, Indian tribes may claim a private cause of action when the United States is a trustee and is entitled to sue to protect the tribe's rights. *See e.g., Keaukaha I*, 588 F.2d at 1224 n.7; *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184, 1186 (9th Cir. 1971), *cert.*

[2] *See also* Chayes, Foreword: Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 4, 15 (1982); Note, Analyzing Taxpayer Standing in Terms of General Standing Principles: The Road Not Taken, 63 B.U.L. Rev. 717, 742-43 (1983).

denied, 405 U.S. 933 (1972); *see also Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 366-72 (1968). But because the United States is not a formal trustee of the § 5(f) homelands trust, *see Keaukaha I*, 588 F.2d at 1224 n.7, and nothing in the legislative history or case interpretation indicates that Congress intended a different result for the 5(f) ceded land trust at issue here, we hold that the Hou cannot claim a private cause of action under the "co-plaintiff" doctrine. *Id.*

[9] Furthermore, our holding *Keaukaha I* that individual Hawaiians do not have an implied cause of action under the Admission Act, *see* 588 F.2d at 1223-24, applies with equal force to bar the Hou Hawaiians from claiming a cause of action. Although the Hou are members of a "class for whose *especial* benefit the statute was enacted," *Cort v. Ash*, 422 U.S. 66, 78 (1975) (emphasis in original), nothing in the legislative history of the Admission Act indicates that Congress intended native Hawaiian groups, as distinguished from individual Hawaiians whose claims were rejected in *Keaukaha I*, to enjoy a private cause of action. "Indeed, the rare references in the Committee reports to enforcement of section 5's trust provisions refer exclusively to the public cause of action." *Keaukaha I*, 588 F.2d at 1223. Because the remaining two elements of the *Cort v. Ash* test—the general scheme of the Admission Act and the magnitude of the State's concern in this area—have also been decided by *Keaukaha I* in favor of the State, the Hou cannot claim an implied private cause of action. *See id.* at 1224.

VI. *Conclusion.*

The Hou have not established that they are "duly recognized by the Secretary of the Interior," and hence cannot claim jurisdiction under 28 U.S.C. § 1362. However, both the federal nature of the section 5(f) trust and the state-federal compact that led to its creation support general federal question jurisdiction under 28 U.S.C. § 1331. The Hou have also alleged an "injury-in-fact" sufficient to confer standing.

Because the State has not waived its sovereign immunity, we

must dismiss the Hous' claims against all parties except George Ariyoshi in his capacity as governor. This claim against Ariyoshi, however, must be dismissed as well because the Hou cannot claim a private cause of action under the Admission Act.[3] The district court's judgment is AFFIRMED.

[3]Because we lack jurisdiction to decide the case, we express no opinion on the merits of a suit to enforce the section 5(f) trust properly brought by the Department of the Interior.

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THE ADMISSION ACT

An Act to Provide for the Admission of the State of Hawaii into the Union

(Act of March 18, 1959, Pub L 86-3, 73 Stat 4)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject to the provisions of this Act, and upon issuance of the proclamation required by section 7 (c) of this Act, the State of Hawaii is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, and the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Hawaii entitled "An Act to provide for a constitutional convention, the adoption of a State constitutional convention, the adoption of a State constitution, and the forwarding of the same to the Congress of the United States, and appropriating money therefor", approved May 20, 1949 (Act 334, Session Laws of Hawaii, 1949), and adopted by a vote of the people of Hawaii in the election held on November 7, 1950, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed.

Case Notes

"Equal footing," referred to: 44 H. 634, 642, 361 P.2d 390.
Hawaii not denied "equal footing" by reason of C.A.B. control over interisland air transportation. 363 F.2d 120.

§2. The State of Hawaii shall consist of all the islands, together with their appurtenant reefs and territorial waters, included in the Territory of Hawaii on the date of enactment of this Act, except the atoll known as Palmyra Island, together with its appurtenant reefs and territorial waters, but said State shall not be deemed to include the Midway Islands, Johnston Island, Sand Island (offshore from Johnston Island), or Kingman Reef, together with their appurtenant reefs and territorial waters.

Case Notes

See also notes to State Const. Art. XIII §1.
Question of jurisdiction over channels between islands raised but not decided. 47 H. 87, 384 P.2d 536.
Territorial waters extend only three miles from each island. 235 F. Supp. 990.

§3. The constitution of the State of Hawaii shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence.

§4. As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or

repeal only with the consent of the United States, and in no other manner: *Provided,* That (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.

§5. (a) Except as provided in subsection (c) of this section, the State of Hawaii and its political subdivisions, as the case may be, shall succeed to the title of the Territory of Hawaii and its subdivisions in those lands and other properties in which the Territory and its subdivisions now hold title.

(b) Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property, and to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

(c) Any lands and other properties that, on the date Hawaii is admitted into the Union, are set aside pursuant to law for the use of the United States under any (1) Act of Congress, (2) Executive order, (3) proclamation of the President, or (4) proclamation of the Governor of Hawaii shall remain the property of the United States subject only to the limitations, if any, imposed under (1), (2), (3), or (4), as the case may be.

(d) Any public lands or other public property that is conveyed to the State of Hawaii by subsection (b) of this section but that, immediately prior to the admission of said State into the Union, is controlled by the United States pursuant to permit, license, or permission, written or verbal, from the Territory of Hawaii or any department thereof may, at any time during the five years following the admission of Hawaii into the Union, be set aside by Act of Congress or by Executive order of the President, made pursuant to law, for the use of the United States, and the lands or property so set aside shall, subject only to valid rights then existing, be the property of the United States. [Am July 12, 1960, Pub L 86-624, 74 Stat 422]

(e) Within five years from the date Hawaii is admitted into the Union, each Federal agency having control over any land or property that is retained by the United States pursuant to subsections (c) and (d) of this section shall report

o the President the facts regarding its continued need for such land or property, and if the President determines that the land or property is no longer needed by the United States it shall be conveyed to the State of Hawaii.

(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

(g) As used in this Act, the term "lands and other properties" includes public lands and other public property, and the term "public lands and other public property" means, and is limited to, the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded.

(h) All laws of the United States reserving to the United States the free use or enjoyment of property which vests in or is conveyed to the State of Hawaii or its political subdivisions pursuant to subsection (a), (b), or (e) of this section or reserving the right to alter, amend, or repeal laws relating thereto shall cease to be effective upon the admission of the State of Hawaii into the Union.

(i) The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) and the Outer Continental Shelf Lands Act of 1953 (Public Law 212, Eighty-third Congress, first session, 67 Stat. 462) shall be applicable to the State of Hawaii, and the said State shall have the same rights as do existing States thereunder.

Revised conveyance procedures. Act of December 23, 1963, Pub L 88-233, 77 Stat 472, provides: That (a) (i) whenever after August 21, 1964, any of the public lands and other public property as defined in section 5 (g) of Public Law 86-3 (73 Stat. 4, 6), or any lands acquired by the Territory of Hawaii and its subdivisions, which are the property of the United States pursuant to section 5 (c) or become the property of the United States pursuant to section 5 (d) of Public Law 86-3, except the lands administered pursuant to the Act of August 25, 1916 (39 Stat. 535), as amended, and (ii) whenever any of the lands of the United States on Sand Island, including the reef lands in connection therewith, in the city and county of Honolulu, are determined to be surplus property by the Administrator of General Services (hereinafter referred to as the "Administrator") with the concurrence of the head of the department or agency exercising administration or control over such lands and property, they shall be conveyed to the State of Hawaii by the Administrator subject to the provisions of this Act.

(b) Such lands and property shall be conveyed without monetary consideration, but subject to such other terms and conditions as the Administrator may prescribe: *Provided*, That, as a condition precedent to the conveyance of such lands, the Administrator shall require payment by the State of Hawaii of the estimated fair market value, as determined by the Administrator, of any buildings, structures, and other improvements erected and made on such lands after they were set aside. In the event that the State of Hawaii does not agree to any payment prescribed by the Administrator, he may remove, relocate, and otherwise dispose of any such buildings, structures, and other improvements under other applicable laws, or if the Administrator determines that they cannot be removed without substantial damage to them or the lands containing them, he may dispose of

them and the lands involved under other applicable laws, but, in such cases he shall pay to the State of Hawaii that portion of any proceeds from such disposal which he estimates to be equal to the value of the lands involved. Nothing in this section shall prevent the disposal by the Administrator under other applicable laws of the lands subject to conveyance to the State of Hawaii under this section if the State of Hawaii so chooses.

Sec. 2. Any lands, property, improvements, and proceeds conveyed or paid to the State of Hawaii under section 1 of this Act shall be considered a part of public trust established by section 5 (f) of Public Law 86-3, and shall be subject to the terms and conditions of that trust.

Attorney General Opinions

Duty imposed under paragraphs (c) and (e) on federal agency to report on its continued need of land is limited to lands ceded to U.S. upon annexation and does not extend to lands acquired by U.S. thereafter. U.S. Att. Gen. Op. June 12, 1961.

Case Notes

Hawaii's suit in supreme court, seeking to extend duty to acquired lands, dismissed on ground that U.S. could not be sued without its consent. 373 U.S. 57.

Under submerged lands act, Hawaii's boundaries extend one marine league. 235 F. Supp. 990.

§6. As soon as possible after the enactment of this Act, it shall be the duty of the President of the United States to certify such fact to the Governor of the Territory of Hawaii. Thereupon the Governor of the Territory shall, within thirty days after receipt of the official notification of such approval, issue his proclamation for the elections, as hereinafter provided, for officers of all State elective offices provided for by the constitution of the proposed State of Hawaii, and for two Senators and one Representative in Congress. In the first election of Senators from said State the two senatorial offices shall be separately identified and designated, and no person may be a candidate for both offices. No identification or designation of either of the two senatorial offices, however, shall refer to or be taken to refer to the term of that office, nor shall any such identification or designation in any way impair the privilege of the Senate to determine the class to which each of the Senators elected shall be assigned.

§7. (a) The proclamation of the Governor of Hawaii required by section 6 shall provide for the holding of a primary election and a general election and at such elections the officers required to be elected as provided in section 6 shall be chosen by the people. Such elections shall be held, and the qualifications of voters thereat shall be, as prescribed by the constitution of the proposed State of Hawaii for the election of members of the proposed State legislature. The returns thereof shall be made and certified in such manner as the constitution of the proposed State of Hawaii may prescribe. The Governor of Hawaii shall certify the results of said elections, as so ascertained, to the President of the United States.

(b) At an election designated by proclamation of the Governor of Hawaii, which may be either the primary or the general election held pursuant to subsection (a) of this section, or a territorial general election, or a special election, there shall be submitted to the electors qualified to vote in said election, for adoption or rejection, the following propositions:

"(1) Shall Hawaii immediately be admitted into the Union as a State?

"(2) The boundaries of the State of Hawaii shall be as prescribed in the Act of Congress approved .....
(Date of approval of this act)
and all claims of this State to any areas of land or sea outside the boundaries so prescribed are hereby irrevocably relinquished to the United States.

"(3) All provisions of the Act of Congress approved .....
(Date of approval of this act)
reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawaii are consented to fully by said State and its people."

In the event the foregoing propositions are adopted at said election by a majority of the legal votes cast on said submission, the proposed constitution of the proposed State of Hawaii, ratified by the people at the election held on November 7, 1950, shall be deemed amended as follows: Section 1 of article XIII of said proposed constitution shall be deemed amended so as to contain the language of section 2 of this Act in lieu of any other language; article XI shall be deemed to include the provisions of section 4 of this Act; and section 8 of article XIV shall be deemed amended so as to contain the language of the third proposition above stated in lieu of any other language, and section 10 of article XVI shall be deemed amended by inserting the words "at which officers for all state elective offices provided for by this constitution and two Senators and one Representative in Congress shall be nominated and elected" in lieu of the words "at which officers for all state elective offices provided for by this constitution shall be nominated and elected; but the officers so to be elected shall in any event include two Senators and two Representatives to the Congress, and unless and until otherwise required by law, said Representatives shall be elected at large".

In the event the foregoing propositions are not adopted at said election by a majority of the legal votes cast on said submission, the provisions of this Act shall cease to be effective.

The Governor of Hawaii is hereby authorized and directed to take such action as may be necessary or appropriate to insure the submission of said propositions to the people. The return of the votes cast on said propositions shall be made by the election officers directly to the Secretary of Hawaii, who shall certify the results of the submission to the Governor. The Governor shall certify the results of said submission, as so ascertained, to the President of the United States.

(c) If the President shall find that the propositions set forth in the preceding subsection have been duly adopted by the people of Hawaii, the President, upon certification of the returns of the election of the officers required to be elected as provided in section 6 of this Act, shall thereupon issue his proclamation announcing the results of said election as so ascertained. Upon the issuance of said proclamation by the President, the State of Hawaii shall be deemed admitted into the Union as provided in section 1 of this Act.

Until the said State is so admitted into the Union, the persons holding legislative, executive, and judicial office in, under, or by authority of the government of said Territory, and the Delegate in Congress thereof, shall continue to discharge the duties of their respective offices. Upon the issuance of said proclamation by the President of the United States and the admission of the State of Hawaii into the Union, the officers elected at said election, and qualified under the provisions of the constitution and laws of said State, shall proceed to exercise all the functions pertaining to their offices in, under, or by authority of the government of said State, and officers not required to be elected at said initial election shall be selected or continued in office as provided by the constitution

Senators and Representative in the manner required by law, and the said Senators and Representative shall be entitled to be admitted to seats in Congress and to all the rights and privileges of Senators and Representatives of other States in the Congress of the United States.

§8. The State of Hawaii upon its admission into the Union shall be entitled to one Representative until the taking effect of the next reapportionment, and such Representative shall be in addition to the membership of the House of Representatives as now prescribed by law: *Provided,* That such temporary increase in the membership shall not operate to either increase or decrease the permanent membership of the House of Representatives as prescribed in the Act of August 8, 1911 (37 Stat. 13), nor shall such temporary increase affect the basis of apportionment established by the Act of November 15, 1941 (55 Stat. 761; 2 U.S.C., sec. 2a), for the Eighty-third Congress and each Congress thereafter.

§9. Effective upon the admission of the State of Hawaii into the Union–

(a) the United States District Court for the District of Hawaii established by and existing under title 28 of the United States Code shall henceforth be a court of the United States with judicial power derived from article III, section 1, of the Constitution of the United States; *Provided, however,* That the terms of office of the district judges for the district of Hawaii then in office shall terminate upon the effective date of this section and the President, pursuant to sections 133 and 134 of title 28, United States Code, as amended by this Act, shall appoint, by and with the advice and consent of the Senate, two district judges for the said district who shall hold office during good behavior;

(b) the last paragraph of section 133 of title 28, United States Code, is repealed; and

(c) subsection (a) of section 134 of title 28, United States Code, is amended by striking out the words "Hawaii and". The second sentence of the same section is amended by striking out the words "Hawaii and", "six and", and "respectively".

§10. Effective upon the admission of the State of Hawaii into the Union the second paragraph of section 451 of title 28, United States Code, is amended by striking out the words "including the district courts of the United States for the districts of Hawaii and Puerto Rico," and inserting in lieu thereof the words "including the United States District for the District of Puerto Rico,".

§11. Effective upon the admission of the State of Hawaii into the Union–

(a) the last paragraph of section 501 of title 28, United States Code, is repealed;

(b) the first sentence of subsection (a) of section 504 of title 28, United States Code, is amended by striking out at the end thereof the words ", except in the district of Hawaii, where the term shall be six years";

(c) the first sentence of subsection (c) of section 541 of title 28, United States Code, is amended by striking out at the end thereof the words ", except in the district of Hawaii where the term shall be six years"; and

(d) subsection (d) of section 541 of title 28, United States Code is repealed.

Cross References

See Public Law 89-554, 80 Stat. 378, 660.

§12. No writ, action, indictment, cause, or proceeding pending in any court of the Territory of Hawaii or in the United States District Court for the District of Hawaii shall abate by reason of the admission of said State into the Union, but the same shall be transferred to and proceeded with in such appropriate State courts as shall be established under the constitution of said State, or shall continue in the United States District Court for the District of Hawaii, as the nature of the case may require. And no writ, action, indictment, cause or proceeding shall abate by reason of any change in the courts, but shall be proceeded with in the State or United States courts according to the laws thereof, respectively. And the appropriate State courts shall be the successors of the courts of the Territory as to all cases arising within the limits embraced within the jurisdiction of such courts, respectively, with full power to proceed with the same, and award mesne or final process therein, and all the files, records, indictments, and proceedings relating to any such writ, action, indictment, cause or proceeding shall be transferred to such appropriate State courts and the same shall be proceeded with therein in due course of law.

All civil causes of action and all criminal offenses which shall have arisen or been committed prior to the admission of said State, but as to which no writ, action, indictment or proceeding shall be pending at the date of such admission, shall be subject to prosecution in the appropriate State courts or in the United States District Court for the District of Hawaii in like manner, to the same extent, and with like right of appellate review, as if said State had been created and said State courts had been established prior to the accrual of such causes of action or the commission of such offenses. The admission of said State shall effect no change in the substantive or criminal law governing such causes of action and criminal offenses which shall have arisen or been committed; and such of said criminal offenses as shall have been committed against the laws of the Territory shall be tried and punished by the appropriate courts of said State, and such as shall have been committed against the laws of the United States shall be tried and punished in the United States District Court for the District of Hawaii.

Case Notes

Remand to Supreme Court of State as successor of Supreme Court of Territory. 274 F.2d 356.

§13. Parties shall have the same rights of appeal from and appellate review of final decisions of the United States District Court for the District of Hawaii or the Supreme Court of the Territory of Hawaii in any case finally decided prior to admission of said State into the Union, whether or not an appeal therefrom shall have been perfected prior to such admission, and the United States Court of Appeals for the Ninth Circuit and the Supreme Court of the United States shall have the same jurisdiction therein, as by law provided prior to admission of said State into the Union, and any mandate issued subsequent to the admission of said State shall be to the United States District Court for the District of Hawaii or a court of the State, as may be appropriate. Parties shall have the same rights of appeal from and appellate review of all orders, judgments, and decrees of the United States District Court for the District of Hawaii and of the Supreme Court of the State of Hawaii as successor to the Supreme Court of the Territory of

Hawaii, in any case pending at the time of admission of said State into the Union, and the United States Court of Appeals for the Ninth Circuit and the Supreme Court of the United States shall have the same jurisdiction therein, as by law provided in any case arising subsequent to the admission of said State into the Union.

Case Notes

Right of appeal from judgment of Supreme Court of Territory preserved by this section. 279 F.2d 636, 637, note 1; 283 F.2d 86; 287 F.2d 51, 52.

§14. Effective upon the admission of the State of Hawaii into the Union–

(a) title 28, United States Code, section 1252, is amended by striking out "Hawaii and" from the clause relating to courts of record;

(b) title 28, United States Code, section 1293, is amended by striking out the words "First and Ninth Circuits" and by inserting in lieu thereof "First Circuit", and by striking out the words, "supreme courts of Puerto Rico and Hawaii, respectively" and inserting in lieu thereof, "supreme court of Puerto Rico";

(c) title 28, United States Code, section 1294, as amended, is further amended by striking out paragraph (4) thereof and by renumbering paragraphs (5) and (6) accordingly;

(d) the first paragraph of section 373 of title 28, United States Code, as amended, is further amended by striking out the words "United States District Courts for the districts of Hawaii or Puerto Rico," and inserting in lieu thereof the words "United States District Court for the District of Puerto Rico,"; and by striking out the words "and any justice of the Supreme Court of the Territory of Hawaii": *Provided,* That the amendments made by this subsection shall not affect the rights of any judge or justice who may have retired before the effective date of this subsection: *And provided further,* That service as a judge of the District Court for the Territory of Hawaii or as a judge of the United States District Court for the District of Hawaii or as a justice of the Supreme Court of the Territory of Hawaii or as a judge of the circuit courts of the Territory of Hawaii shall be included in computing under section 371, 372, or 373 of title 28, United States Code, the aggregate years of judicial service of any person who is in office as a district judge for the District of Hawaii on the date of enactment of this Act;

(e) section 92 of the Act of April 30, 1900 (ch. 339, 31 Stat. 159), as amended, and the Act of May 29, 1928 (ch. 904, 45 Stat. 997), as amended, are repealed;

(f) section 86 of the Act approved April 30, 1900 (ch. 339, 31 Stat. 158), as amended, is repealed;

(g) section 3771 of title 18, United States Code, as heretofore amended, is further amended by striking out from the first paragraph of such section the words "Supreme Courts of Hawaii and Puerto Rico" and inserting in lieu thereof the words "Supreme Court of Puerto Rico";

(h) section 3772 of title 18, United States Code, as heretofore amended, is further amended by striking out from the first paragraph of such section the words "Supreme Courts of Hawaii and Puerto Rico" and inserting in lieu thereof the words "Supreme Court of Puerto Rico";

(i) section 91 of title 28, United States Code, as heretofore amended, is further amended by inserting after "Kure Island" and before "Baker Island" the words "Palmyra Island,"; and

(j) the Act of June 15, 1950 (64 Stat. 217; 48 U.S.C., §644a), is amended by inserting after "Kure Island" and before "Baker Island" the words "Palmyra Island,".

§15. All Territorial laws in force in the Territory of Hawaii at the time of its admission into the Union shall continue in force in the State of Hawaii, except as modified or changed by this Act or by the constitution of the State, and shall be subject to repeal or amendment by the Legislature of the State of Hawaii, except as provided in section 4 of this Act with respect to the Hawaiian Homes Commission Act, 1920, as amended; and the laws of the United States shall have the same force and effect within the said State as elsewhere within the United States: *Provided*, That, except as herein otherwise provided, a Territorial law enacted by the Congress shall be terminated two years after the date of admission of the State of Hawaii into the Union or upon the effective date of any law enacted by the State of Hawaii which amends or repeals it, whichever may occur first. As used in this section, the term "Territorial laws" includes (in addition to laws enacted by the Territorial Legislature of Hawaii) all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Hawaii prior to its admission into the Union, and the term "laws of the United States" includes all laws or parts thereof enacted by the Congress that (1) apply to or within Hawaii at the time of its admission into the Union, (2) are not "Territorial laws" as defined in this paragraph, (3) are not in conflict with any other provision of this Act.

Attorney General Opinions

The two-year proviso terminating a territorial law enacted by Congress was intended to apply specifically to the administration of laws regulating intrastate commerce and is not applicable to the public land laws. Att. Gen. Op. 61-68.

Case Notes

As to cut-off period, Congress had in view specifically the termination of federal responsibility for the administration of laws regulating intrastate commerce. 44 H. 634, 361 P.2d 390.

By section, C.A.B. jurisdiction over carriage by aircraft between places in the State continued to be an exception to rate-making authority of state public utilities commission during transition period. 44 H. 634, 361 P.2d 390.

Authority of Congress to provide for government of Hawaii prior to statehood was derived from Art. IV, §3, cl. 2, U.S. Const. 44 H. 634, 361 P.2d 390.

A statute invalid under Sherman Act at time of statehood would not have been continued in force by this section. 283 F.2d 86, 89, note 2.

Concerning continuance of certain acts of Congress for two years, see 235 F. Supp. 705, 712.

Cited: 26 F.R.D. 384, 386.

§16. (a) Notwithstanding the admission of the State of Hawaii into the Union, the United States shall continue to have sole and exclusive jurisdiction over the area which may then or thereafter be included in Hawaii National Park, saving, however, to the State of Hawaii the same rights as are reserved to the Territory of Hawaii by section 1 of the Act of April 19, 1930 (46 Stat. 227), and saving, further, to persons then or thereafter residing within such area the right to vote at all elections held within the political subdivisions where they respective-

ly reside. Upon the admission of said State all references to the Territory of Hawaii in said Act or in other laws relating to Hawaii National Park shall be deemed to refer to the State of Hawaii. Nothing contained in this Act shall be construed to affect the ownership and control by the United States of any lands or other property within Hawaii National Park which may now belong to, or which may hereafter be acquired by, the United States.

(b) Notwithstanding the admission of the State of Hawaii into the Union, authority is reserved in the United States, subject to the proviso hereinafter set forth, for the exercise by the Congress of the United States of the power of exclusive legislation, as provided by article I, section 8, clause 17, of the Constitution of the United States, in all cases whatsoever over such tracts or parcels of land as, immediately prior to the admission of said State, are controlled or owned by the United States and held for Defense or Coast Guard purposes, whether such lands were acquired by cession and transfer to the United States by the Republic of Hawaii and set aside by Act of Congress or by Executive order or proclamation of the President or the Governor of Hawaii for the use of the United States, or were acquired by the United States by purchase, condemnation, donation, exchange, or otherwise: *Provided*, (i) That the State of Hawaii shall always have the right to serve civil or criminal process within the said tracts or parcels of land in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed within the said State but outside of the said tracts or parcels of land, (ii) that the reservation of authority in the United States for the exercise by the Congress of the United States of the power of exclusive legislation over the lands aforesaid shall not operate to prevent such lands from being a part of the State of Hawaii, or to prevent the said State from exercising over or upon such lands, concurrently with the United States, any jurisdiction whatsoever which it would have in the absence of such reservation of authority and which is consistent with the laws hereafter enacted by the Congress pursuant to such reservation of authority; and (iii) that such power of exclusive legislation shall vest and remain in the United States only so long as the particular tract or parcel of land involved is controlled or owned by the United States and used for Defense or Coast Guard purposes: *Provided, however,* That the United States shall continue to have sole and exclusive jurisdiction over such military installations as have been heretofore or hereafter determined to be critical areas as delineated by the President of the United States and/or the Secretary of Defense.

§17. The next to last sentence of the first paragraph of section 2 of the Federal Reserve Act (38 Stat. 251) as amended by section 19 of the Act of July 7, 1958, (72 Stat. 339, 350) is amended by inserting after the word "Alaska" the words "or Hawaii."

§18. (a) Nothing contained in this Act shall be construed as depriving the Federal Maritime Board of the exclusive jurisdiction heretofore conferred on it over common carriers engaged in transportation by water between any port in the State of Hawaii and other ports in the United States, or possessions, or as conferring on the Interstate Commerce Commission jurisdiction over transportation by water between any such ports.

(b) Effective on the admission of the State of Hawaii into the Union–

(1) The first sentence of section 506 of the Merchant Marine Act, 1936, as amended (46 U.S.C., §1156), is amended by inserting before the words "an island possession or island territory," the words "the State of Hawaii, or";

(2) Section 605 (a) of the Merchant Marine Act, 1936, as amended (46 U.S.C., §1175), is amended by inserting before the words "an island possession or island territory", the words "the State of Hawaii, or"; and

(3) The second paragraph of section 714 of the Merchant Marine Act, 1936, as amended (46 U.S.C., §1204), is amended by inserting before the words "an island possession or island territory" the words "the State of Hawaii, or". [Am July 12, 1960, Pub L 86-324, 74 Stat 423]

§19. Nothing contained in this Act shall operate to confer United States nationality, nor to terminate nationality heretofore lawfully acquired, or restore nationality heretofore lost under any law of the United States or under any treaty to which the United States is or was a party.

§20. (a) Section 101 (a) (36) of the Immigration and Nationality Act (66 Stat. 170, 8 U.S.C., §1101 (a) (36), is amended by deleting the word "Hawaii,".

(b) Section 212 (d) (7) of the Immigration and Nationality Act (66 Stat. 188, 8 U.S.C. 1182 (d) (7), is amended by deleting from the first sentence thereof the word "Hawaii" and by deleting the proviso to said first sentence.

(c) The first sentence of section 310(a) of the Immigration and Nationality Act, as amended (66 Stat. 239, 8 U.S.C. 1421(a), 72 Stat. 351) is further amended by deleting the words "for the Territory of Hawaii, and".

(d) Nothing contained in this Act shall be held to repeal, amend, or modify the provisions of section 305 of the Immigration and Nationality Act (66 Stat. 237, 8 U.S.C. 1405).

§21. Effective upon the admission of the State of Hawaii into the Union, section 3, subsection (b), of the Act of September 7, 1957 (71 Stat. 629), is amended by substituting the words "State of Hawaii" for the words "Territory of Hawaii".

§22. If any provision of this Act, or any section, subsection, sentence, clause, phrase, or individual word, or the application thereof in any circumstance is held invalid, the validity of the remainder of the Act and of the application of any such provision, section, subsection, sentence, clause, phrase, or individual word in other circumstances shall not be affected thereby.

§23. All Acts or parts of Acts in conflict with the provisions of this Act, whether passed by the legislature of said Territory or by Congress are hereby repealed.

HAWAIIAN HOMES COMMISSION ACT, 1920

(Act of July 9, 1921, c 42, 42 Stat 108)

This Act is now part of the State Constitution and is subject to amendment or repeal as prescribed in Article XI of the Constitution.
Bracketed section headings have been inserted and are not official.

TITLE 1: DEFINITIONS

§1. That this Act may be cited as the "Hawaiian Homes Commission Act, 1920."

§2. That when used in this Act the term "Hawaiian Organic Act" means the Act entitled "An Act to provide a government for the Territory of Hawaii," approved April 30, 1900, as amended.

TITLE 2: HAWAIIAN HOMES COMMISSION

§201. [Definitions.] (a) That when used in this title:

(1) The term "commission" means the Hawaiian Homes Commission;

(2) The term "public land" has the same meaning as defined in paragraph (3) of subdivision (a) of section 73 of the Hawaiian Organic Act;

(3) The term "fund" means the Hawaiian home loan fund;

(4) The term "State" means the State of Hawaii;

(5) The term "Hawaiian home lands" means all lands given the status of Hawaiian home lands under the provisions of section 204 of this title;

(6) The term "tract" means any tract of Hawaiian home lands leased, as authorized by section 207 of this title, or any portion of such tract;

(7) The term "native Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778;

(8) The term "irrigated pastoral land" means land not in the description of the agricultural land but which, through irrigation, is capable of carrying more livestock the year through than first-class pastoral land.

(b) Any term defined or described in section 347 or 351 of the Revised Laws of Hawaii of 1915, except a term defined in subdivision (a) of this section, shall, whenever used in this title, have the same meaning as given by such definition or description. [Am Jun. 8, 1954, c 321, §2, 68 Stat 263; am L 1963, c 207, §5(a)]

§202. Department officers, staff, commission, members, compensation. (a) There shall be a department of Hawaiian home lands which shall be headed by an executive board to be known as the Hawaiian homes commission. The members of the commission shall be nominated and appointed in accordance with

section 26-34, Hawaii Revised Statutes. The commission shall be composed of seven members, four of whom shall be residents of the city and county of Honolulu; of the remaining members, one shall be a resident of the county of Hawaii, one a resident of the county of Maui, and one a resident of the county of Kauai. All members shall have been residents of the State at least three years prior to their appointment and at least four of the members shall be descendants of not less than one-fourth part of the blood of the races inhabiting the Hawaiian islands previous to 1778. The members of the commission shall serve without pay, but shall receive actual expenses incurred by them in the discharge of their duties as such members. The governor shall appoint the chairman of the commission from among the members thereof.

The commission may delegate to the chairman such duties, powers, and authority or so much thereof, as may be lawful or proper for the performance of the functions vested in the commission. The chairman of the commission shall serve in a full-time capacity. He shall, in such capacity, perform such duties, and exercise such powers and authority, or so much thereof, as may be delegated to him by the commission as herein provided above.

(b) The provisions of section 76-16 Hawaii Revised Statutes, shall apply to the positions of the first deputy and private secretary to the chairman of the commission. All other positions in the department shall be subject to the provisions of chapters 76 and 77, Hawaii Revised Statutes, and employees having tenure, according to the employment practices of the department, immediately prior to [June 20, 1963] and occupying positions in accordance with the state's position classifications and compensation plans shall be given permanent appointment status under chapter 76 without a reduction in pay or the loss of seniority, prior service credit, vacation or sick leave earned heretofore. An employee with tenure who does not occupy a position under chapters 76 and 77 shall be appointed to the position after it has been classified and assigned to an appropriate salary range by the director of personnel services and such employee shall not suffer a reduction in pay or loss of seniority and other credits earned heretofore.

All vacancies and new positions which are covered by the provisions of chapters 76 and 77, Hawaii Revised Statutes, shall be filled in accordance with the provisions of sections 76-23 and 76-31, Hawaii Revised Statutes, provided that the provisions of these sections shall be applicable first to qualified persons of Hawaiian extraction. [Am Jul. 26, 1935, c 420, §1, 49 Stat 504; May 31, 1944, c 216, §1, 58 Stat 260; Jul. 1, 1952, c 618, 66 Stat 515; am L 1963, c 207, §1; am imp L 1965, c 223, §§5, 8]

Cross References

Acting board members, see §26-36.
Membership on other boards prohibited, see §78-4.
Public agency meetings and records, see chapter 92.

§203. [Certain public lands designated "available lands."] All public lands of the description and acreage, as follows, excluding (a) all lands within any forest reservation, (b) all cultivated sugar-cane lands, and (c) all public lands held under a certificate of occupation, homestead lease, right of purchase lease, or special homestead agreement, are hereby designated, and hereinafter referred to, as "available lands":

(1) On the island of Hawaii: Kamaoa-Puueo (eleven thousand acres, more or less), in the district of Kau; Puukapu (twelve thousand acres, more or

less), Kawaihae 1 (ten thousand acres, more or less), and Pauahi (seven hundred and fifty acres, more or less), in the district of South Kohala; Kamoku-Kapulena (five thousand acres, more or less), Waimanu (two hundred acres, more or less), Nienie (seven thousand three hundred and fifty acres, more or less), in the district of Hamakua; fifty-three thousand acres to be selected by the department from the lands of Humuula Mauka, in the district of North Hilo; Panaewa, Waiakea (two thousand acres, more or less), Waiakea-kai, or Keaukaha (two thousand acres, more or less), and two thousand acres of agricultural lands to be selected by the department from the lands of Piihonua, in the district of South Hilo; and two thousand acres to be selected by the department from the lands of Kaohe-Makuu, in the district of Puna; land at Keaukaha, Hawaii, more particularly described as follows:

PARCEL 1

Now set aside as Keaukaha Beach Park by Executive Order Numbered 421, and being a portion of the Government land at Waiakea, South Hilo, Hawaii.

Beginning at the southeast corner of this parcel of land, on the north side of Kalanianaole Road, the coordinates of said point of beginning referred to Government survey triangulation station "Halai" being five thousand six hundred and eighty-one and twelve one-hundredths feet north and seventeen thousand nine hundred and thirty-three and fifteen one-hundredths feet east, as shown on Government Survey Registered Map Numbered 2704, and running by true azimuths.

1. Sixty-one degrees fifty-eight minutes one thousand three hundred and fifty-one and seventy-three one-hundredths feet along the north side of Kalanianaole Road (fifty feet wide);

2. One hundred and fifty-one degrees fifty-eight minutes eight hundred and forty feet along United States military reservation for river and harbor improvements (Executive Order Numbered 176);

Thence along the seashore at high-water mark, the direct azimuths and distances between points at seashore being:

3. Two hundred and eighty-two degrees no minutes four hundred and sixty-eight and fifty one-hundredths feet;

4. Three hundred and thirteen degrees twenty minutes four hundred and forty-one feet;

5. Two hundred and sixty degrees twenty minutes one hundred and forty feet;

6. Two hundred and forty-two degrees twenty minutes two hundred and fifty feet;

7. One hundred and eighty-eight degrees forty minutes sixty feet;

8. Two hundred and seventy-two degrees twenty minutes one hundred and seventy feet;

9. Two hundred and five degrees no minutes sixty feet;

10. One hundred and ten degrees twenty minutes two hundred and twenty feet;

11. Ninety degrees fifty minutes eighty feet;

12. One hundred and sixty-two degrees no minutes one hundred and seventy feet;

13. Two hundred and fifty degrees thirty minutes four hundred and thirty feet;

14. Three hundred and thirty-one degrees fifty-eight minutes three hundred and eighty feet along parcel II of Government land to the point of beginning and containing an area of eleven and twenty one-hundredths acres, more or less.

PARCEL II

Being a portion of the Government land of Waiakea, South Hilo, Hawaii, and located on the north side of Kalanianaole Road and adjoining parcel I, hereinbefore described.

Beginning at the south corner of this parcel of land, on the north side of Kalanianaole Road, the coordinates of said point of beginning referred to Government survey triangulation station "Halai," being five thousand six hundred and eighty-one and twelve one-hundredths feet north and seven thousand nine hundred and thirty-three and fifteen one-hundredths feet east and running by true azimuths:

1. One hundred and fifty-one degrees fifty-six minutes three hundred and eighty feet along the east boundary of parcel I;

2. Two hundred and twenty-nine degrees forty-five minutes thirty seconds one hundred and ninety-one and one one-hundredths feet;

3. One hundred and ninety-eight degrees no minutes two hundred and thirty feet to a one-and-one-half inch pipe set in concrete;

4. Three hundred and seven degrees thirty-eight minutes five hundred and sixty-two and twenty-one one-hundredths feet to a one-and-one-half inch pipe set in concrete;

5. Twenty-eight degrees no minutes one hundred and twenty-one and thirty-seven one-hundredths feet to the north side of Kalanianaole Road;

6. Sixty-one degrees fifty-eight minutes four hundred and eighty-three and twenty-two one-hundredths feet along the north side of Kalanianaole Road to the point of beginning and containing an area of five and twenty-six one-hundredths acres, more or less.

(2) On the island of Maui:* Kahikinui (twenty-five thousand acres, more or less) in the district of Kahikinui, and the public lands (six thousand acres, more or less) in the district of Kula;

(3) On the island of Molokai: Palaau (eleven thousand four hundred acres, more or less), Kapaakea (two thousand acres, more or less), Kalamaula (six thousand acres, more or less), Hoolehua (three thousand five hundred acres, more or less), Kamiloloa I and II (three thousand six hundred acres, more or less), and Makakupaia (two thousand two hundred acres, more or less) and Kalaupapa (five thousand acres, more or less);

(4) On the island of Oahu: Nanakuli (three thousand acres, more or less), and Lualualei (two thousand acres, more or less), in the District of Waianae; and Waimanalo (four thousand acres, more or less), in the District of Koolaupoko, excepting therefrom the military reservation and the beach lands; and those certain portions of the lands of Auwaiolimu, Kewalo, and Kalawahine described by metes and bounds as follows, to-wit:

*See second to last paragraph of this section as added by Act of June 3, 1948, c 384, referring to available lands at Wailuku, Maui.

(I) Portion of the Government land at Auwaiolimu, Punchbowl Hill, Honolulu, Oahu, described as follows:

Beginning at a pipe at the southeast corner of this tract of land, on the boundary between the lands of Kewalo and Auwaiolimu, the coordinates of said point of beginning referred to Government Survey triangulation station "Punchbowl," being one thousand one hundred and thirty-five and nine-tenths feet north and two thousand five hundred and fifty-seven and eight-tenths feet east as shown on Government Survey Registered Map Numbered 2692, and running by true azimuths:

1. One hundred and sixty-three degrees thirty-one minutes two hundred and thirty-eight and eight-tenths feet along the east side of Punchbowl-Makiki Road;

2. Ninety-four degrees eight minutes one hundred and twenty-four and nine-tenths feet across Tantalus Drive and along the east side of Puuowaina Drive;

3. One hundred and thirty-one degrees thirteen minutes two hundred and thirty-two and five-tenths feet along a twenty-five foot roadway;

4. One hundred and thirty-nine degrees fifty-five minutes twenty and five-tenths feet along same;

5. One hundred and sixty-eight degrees seventeen minutes two hundred and fifty-seven and eight-tenths feet along Government land (old quarry lot);

6. One hundred and fifty-six degrees thirty minutes three hundred and thirty-three feet along same to a pipe;

7. Thence following the old Auwaiolimu stone wall along L.C. Award Numbered 3145, to Laenui, grant 5147 (lot 8 to C.W. Booth), L.C. Award Numbered 1375, to Kapule, and L.C. Award Numbered 1355, to Kekuanoni, the direct azimuth and distance being two hundred and forty-nine degrees forty-one minutes one thousand three hundred and three and five-tenths feet;

8. Three hundred and twenty-one degrees, twelve minutes, six hundred and ninety-three feet along the remainder of the land of Auwaiolimu;

9. Fifty-one degrees, twelve minutes, one thousand and four hundred feet along the land of Kewalo to the point of beginning, containing an area of twenty-seven acres, excepting and reserving therefrom Tantalus Drive and Auwaiolimu Street crossing this land.

(II) Portion of the land of Kewalo, Punchbowl Hill, Honolulu, Oahu, being part of the lands set aside for the use of the Hawaii Experiment Station of the United States Department of Agriculture by proclamation of the Acting Governor of Hawaii, dated June 10, 1901, and described as follows:

Beginning at the northeast corner of this lot, at a place called "Puu Ea" on the boundary between the lands of Kewalo and Auwaiolimu, the coordinates of said point of beginning referred to Government survey triangulation station "Punchbowl," being three thousand two hundred and fifty-five and six-tenths feet north and five thousand two hundred and forty-four and seven-tenths feet east, as shown on Government Survey Registered Map Numbered 2692 of the State of Hawaii, and running by true azimuths:

1. Three hundred and fifty-four degrees thirty minutes nine hundred and thirty feet along the remainder of the land of Kewalo, to the middle of the stream which divides the lands of Kewalo and Kalawahine;

2. Thence down the middle of said stream along the land of Kalawahine, the direct azimuth and distance being forty-nine degrees sixteen minutes one thousand five hundred and twelve and five-tenths feet;

3. One hundred and forty-one degrees twelve minutes eight hundred and sixty feet along the remainder of the land of Kewalo;

4. Two hundred and thirty-one degrees twelve minutes five hundred and fifty-two and six-tenths feet along the land of Auwaiolimu to "PUU IOLE";

5. Thence still along the said land of Auwaiolimu following the top of the ridge to the point of beginning, the direct azimuth and distance being two hundred and thirty-two degrees twenty-six minutes one thousand four hundred and seventy feet and containing an area of thirty acres; excepting and reserving therefrom Tantalus Drive crossing this land;

[(III) Repealed. Act of Jul. 9, 1952, c 614, §1, 66 Stat 511]

(IV) Portion of the Hawaii Experiment Station under the control of the United States Department of Agriculture, situated on the northeast side of Auwaiolimu Street.

KEWALO-UKA, HONOLULU, OAHU

Being a portion of the land of Kewalo-uka conveyed by the Territory of Hawaii to the United States of America by proclamations of the Acting Governor of Hawaii, Henry S. Cooper, dated June 10, 1901, and August 16, 1901, and a portion of the United States Navy Hospital reservation described in Presidential Executive Order Numbered 1181, dated March 25, 1910.

Beginning at the west corner of this parcel of land, on the Auwaiolimu-Kewalo-uka boundary and on the northeast side of Auwaiolimu Street, the coordinates of said point of beginning referred to Government survey triangulation station "Punchbowl," being one thousand two hundred and thirty and fifty-eight one-hundredths feet north and two thousand six hundred and seventy-five and six one-hundredths feet east as shown on Government Survey Registered Map Numbered 2985 and running by azimuths measured clockwise from true south:

1. Two hundred and thirty-one degrees twelve minutes one thousand two hundred and forty-eight and twenty-six one-hundredths feet along the land of Auwaiolimu;

2. Three hundred and twenty-one degrees twelve minutes eight hundred and sixty feet along Hawaiian home land as described in Presidential Executive Order Numbered 5561;

3. Thence down along the middle of stream in all its turns and windings along the land of Kalawahine to the north corner of Roosevelt High School lot, the direct azimuth and distance being thirty-three degrees forty-eight minutes forty seconds one thousand one hundred and twelve and twenty one-hundredths feet;

Thence still down along the middle of stream for the next seven courses along the Roosevelt High School premises, the direct azimuth and distances between points in middle of said stream being:

4. Twenty-three degrees forty minutes twenty-eight and ninety one-hundredths feet;

5. Eight degrees no minutes one hundred and fifteen feet;

6. Three hundred and thirty-seven degrees fifty minutes forty-eight feet;

7. Two degrees thirty minutes sixty feet;

8. Forty-nine degrees forty minutes fifty-two feet;

9. Forty-six degrees six minutes ninety and seventy one-hundredths feet;

10. Ninety-two degrees forty-three minutes ninety-five and sixty one-hundredths feet; thence

11. Eighty-three degrees thirty-eight minutes seventy-one and sixty-three one-hundredths feet along state land to the northeast side of Auwaiolimu Street;

12. Thence on a curve to the left with a radius of one thousand one hundred and seventy-six and twenty-eight one-hundredths feet along the northeast side of Auwaiolimu Street along land described in Presidential Executive Order Numbered 1181, dated March 25, 1910, the direct azimuth and distance being one hundred and seventy-two degrees twenty-nine minutes thirty-five seconds one hundred and sixty-four and thirty-nine one-hundredths feet;

13. Thence continuing on a curve to the left with a radius of one thousand one hundred and seventy-six and twenty-eight one-hundredths feet along the northeast side of Auwaiolimu Street, the direct azimuth and distance being one hundred and sixty degrees fifty minutes forty-eight seconds three hundred and twelve and seventy-five one-hundredths feet;

14. Two hundred and twenty-four degrees fifty-three minutes six hundred and seventy and sixty-five one-hundredths feet along the Quarry Reservation (State of Hawaii, owner);

15. One hundred and ten degrees six minutes two hundred and thirty-nine and twenty one-hundredths feet along same;

16. Ninety-two degrees five minutes two hundred and two and twenty one-hundredths feet along same;

17. Fifty-three degrees twenty minutes three hundred and forty and thirty-four one-hundredths feet along same;

18. One hundred and forty-two degrees thirty minutes four hundred and twenty-four and sixty-eight one-hundredths feet along the northeast side of Auwaiolimu Street to the point of beginning and containing an area of twenty-seven and ninety one-hundredths acres; excepting and reserving therefrom that certain area included in Tantalus Drive, crossing this land.

(V) Portion of Kewalo-uka Quarry Reservation. Situate on the northeast side of Auwaiolimu Street.

KEWALO-UKA, HONOLULU, OAHU

Being land reserved by the State of Hawaii within the Hawaii Experiment Station under the control of the United States Department of Agriculture, as described in proclamations of the Acting Governor of Hawaii, Henry E. Cooper, dated June 10, 1901.

Beginning at the northwest corner of this parcel of land and on the northeast side of Auwaiolimu Street, the coordinates of said point of beginning referred to Government survey triangulation station "Punchbowl," being eight hundred and ninety-three and sixty-six one-hundredths feet north and two thousand nine hundred and thirty-three and fifty-nine one-hundredths feet east as shown on Government Survey Registered Map Numbered 2985 and running by azimuths measured clockwise from true south:

1. Two hundred and thirty-three degrees twenty minutes three hundred and forty and thirty-four one-hundredths feet along the Hawaii Experiment Station under the control of the United States Department of Agriculture;

2. Two hundred and seventy-two degrees five minutes two hundred and two and twenty one-hundredths feet along same;

3. Two hundred and ninety degrees six minutes two hundred and thirty-nine and twenty one-hundredths feet along same;

4. Forty-four degrees fifty-three minutes six hundred and seventy and sixty-five one-hundredths feet along same to the northeast side of Auwaiolimu Street;

5. Thence on a curve to the left with a radius of one thousand one hundred and seventy-six and twenty-eight one-hundredths feet along the northeast side of Auwaiolimu Street, the direct azimuth and distance being one hundred and forty-seven degrees fifty-one minutes thirteen seconds two hundred and nineteen and fifty one-hundredths feet;

6. One hundred and forty-two degrees thirty minutes one hundred and thirty-four and fifty-five one-hundredths feet along the northeast side of Auwaiolimu Street;

7. Two hundred and thirty-two degrees thirty minutes twenty feet along same;

8. One hundred and forty-two degrees thirty minutes seventy-one and fifty-seven one-hundredths feet along same to the point of beginning and containing an area of four and six hundred and forty-six one-thousandths acres.

(VI) Being a portion of government land of Auwaiolimu, situated on the northeast side of Hawaiian home land of Auwaiolimu and adjacent to the land of Kewalo-uka at Pauoa Valley, Honolulu, Oahu, State of Hawaii. Beginning at a pipe in concrete at the south corner of this parcel of land, being also the east corner of Hawaiian home land, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Punchbowl," being two thousand twelve and seventy-five one-hundredths feet south and three thousand six hundred forty-seven and eighty-seven one-hundredths feet east, and thence running by azimuths measured clockwise from true south:

1. One hundred and forty-one degrees twelve minutes six hundred and ninety-three feet along Hawaiian home land;

2. Thence along middle of stone wall along L.C.Aw. 1356 to Kekuanoni, Grant 5147, Apana 1 to C.W.Booth, L.C.Aw. 1351 to Kamakainau, L.C.Aw. 1602 to Kahawai, Grant 4197 to Keauloa, L.C.Aw. 5235 to Kaapuiki and Grant 2587 to Haaleiea;

3. Two hundred and ninety-five degrees thirty minutes three hundred and twenty feet along the remainder of government land of Auwaiolimu;

4. Twenty-four degrees sixteen minutes thirty seconds one thousand five hundred seventy-nine and thirty-six one-hundredths feet along the remainder of government land of Auwaiolimu;

5. Thence along middle of ridge along the land of Kewalo-uka to a point called "Puu Iole" (pipe in concrete monument), the direct azimuth and distance being fifty-six degrees no minutes eight hundred and thirty feet;

6. Fifty-two degrees twelve minutes five hundred fifty-two and sixty one-hundredths feet along the land of Kewalo-uka to the point of beginning and containing an area of thirty-three and eighty-eight one-hundredths acres, more or less.

(VII) Being portions of government lands of Kewalo-uka and Kalawahine situated on the east side of Tantalus Drive at Pauoa Valley, Honolulu, Oahu, State of Hawaii. Beginning at the west corner of this parcel of land, the true azimuth and distance to a point called "Puu Ea" (pipe in concrete monument) being one hundred and seventy-four degrees thirty minutes four hundred one and

ninety-nine one-hundredths feet, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Punchbowl" being two thousand eight hundred fifty-five and ten one-hundredths feet north and five thousand two hundred eighty-two and twenty-five one-hundredths feet east and thence running by azimuths measured clockwise from true south:

1. Two hundred and forty-eight degrees nineteen minutes forty seconds eight hundred fifty and fifty-four one-hundredths feet along the land of Kewalo-uka;

2. Sixteen degrees thirty minutes five hundred feet along the land of Kewalo-uka, along the land of Kalawahine;

3. Twenty-five degrees no minutes five hundred feet along the land of Kalawahine;

4. Thirty-five degrees no minutes three hundred and twenty feet along the land of Kalawahine;

5. Fifty degrees forty-six minutes ninety-six and seventy one-hundredths feet along Makiki Forest Ridge lots;

6. Seventy-three degrees twenty minutes two hundred fifty-five and ninety one-hundredths feet along Makiki Forest Ridge lots;

7. Eighty-six degrees thirty-two minutes one hundred sixty-three and forty one-hundredths feet along Makiki Forest Ridge lots;

8. Thence along the south side of Tantalus Drive on a curve to the right with a radius of two hundred and seventy feet, the direct azimuth and distance being two hundred and twenty-one degrees twelve minutes nineteen seconds ninety-eight and thirty-six one-hundredths feet;

9. Two hundred and thirty-one degrees forty-two minutes one hundred ninety-three and thirty-five one-hundredths feet along the south side of Tantalus Drive;

10. Still along Tantalus Drive on a curve to the left with a radius of one hundred eighty and seventy-eight one-hundredths feet, the direct azimuth and distance being one hundred and eighty-one degrees forty-five minutes fifty-five seconds two hundred seventy-six and seventy-two one-hundredths feet;

11. Two hundred and forty-two degrees fifteen minutes sixty-two and thirty-two one-hundredths feet along the land of Kewalo-uka;

12. One hundred and seventy-four degrees thirty minutes five hundred twenty-eight and one one-hundredths feet along the land of Kewalo-uka to the point of beginning and containing an area of five hundred and seventy-four thousand seven hundred and thirty square feet or thirteen and one hundred ninety-four one-thousandths acres.

(5) On the island of Kauai:* Upper land of Waimea, above the cultivated sugar cane lands, in the district of Waimea (fifteen thousand acres, more or less); and Moloaa (two thousand five hundred acres, more or less), and Anahola and Kamalomalo (five thousand acres, more or less).

Wailuku, Maui: That parcel of government land, situate in the District of Wailuku, Island and County of Maui, comprising twelve and four hundred and fifty-five one-thousandths acres of the ILI OF KOU and being a portion of the land covered by General Lease Numbered 2286 to Wailuku Sugar Company, Limited, notwithstanding the fact that said parcel is cultivated sugar cane land, subject, however, to the terms of said lease.

*See last paragraph of this section as added by Act of June 3, 1948, c 397, 62 Stat. 303.

Cultivated Sugar Cane Lands: That parcel of Anahola, Island of Kauai, comprising four hundred and one and four hundred and twenty-three one-thousandths acres, hereinafter described and being portion of the land covered by general lease numbered 2724 to the Lihue Plantation Company, Limited, notwithstanding the fact that said parcel is cultivated sugar cane land, subject however, to the terms of said lease, said parcel being more particularly described as follows:

Being a portion of land described in general lease numbered 2724 to the Lihue Plantation Company situate in the district of Anahola, Kauai, State of Hawaii, beginning at the northwest corner of this parcel of land, the coordinates of which referred to government triangulation station south base are three thousand and forty-nine and sixty-two one-hundredths feet south, one thousand nine hundred and thirty-two and twenty-five one-hundredths feet west, and running thence by azimuths measured clockwise from true south two hundred and eighty-four degrees thirty minutes two hundred and fifty feet, thence on the arc of circular curve to the left, with a radius of eight hundred and ninety feet and a central angle of thirty-five degrees fifteen minutes, the direct azimuth and distance being two hundred and sixty-six degrees fifty-two minutes thirty seconds five hundred and thirty-eight and ninety-six one-hundredths feet, thence two hundred and forty-nine degrees fifteen minutes one thousand eight hundred and nine and twenty-five one-hundredths feet, thence two hundred and twenty-four degrees fifteen minutes three thousand fifty-six feet, thence one hundred and thirty-four degrees fifteen minutes two hundred and seven feet, to the seashore at Anahola Bay, thence along the seashore around Kahala Point, the direct azimuth and distance being two hundred and thirty-seven degrees six minutes seven seconds one thousand and sixty and fourteen one-hundredths feet, thence along the seashore, the direct azimuth and distance being three hundred and thirty-two degrees no minutes one thousand eight hundred and twenty-seven feet, thence along the seashore, the direct azimuth and distance being three hundred and fifty-five degrees no minutes one thousand eight hundred and twenty-seven feet, thence eighty-seven degrees twenty minutes seven hundred and forty feet, thence fifty-nine degrees no minutes two thousand seven hundred and fifteen feet, thence sixty-nine degrees fifteen minutes one thousand eight hundred and eighty-seven and thirty-six one-hundredths feet, thence on the arc of a circular curve to the right with a radius of three thousand and twelve feet, and a central angle of thirty-five degrees fifteen minutes the direct azimuth and distance being eighty-six degrees fifty-two minutes thirty seconds one thousand eight hundred and twenty-three and ninety-eight one-hundredths feet, thence one hundred and four degrees thirty minutes two hundred and fifty feet, thence one hundred and ninety-four degrees thirty minutes one thousand and thirty-one feet, thence on the arc of a circular curve to the left with a radius of six hundred and seven and ninety-five one-hundredths feet and a central angle of fifty-three degrees three minutes thirty seconds the direct azimuth and distance being seventy-seven degrees fifty-eight minutes fifteen seconds five hundred and forty-three and nine one-hundredths feet to the government road, thence two hundred and thirty-one degrees twenty-six minutes thirty seconds one hundred and thirteen and sixty-one one-hundredths feet along the government road, thence along the government road on the arc of a circular curve to the left with a radius of four hundred and seventy-seven feet and a central angle of forty-four degrees twenty-six minutes thirty seconds, the direct azimuth and distance being two hundred and nine

degrees thirteen minutes fifteen seconds three hundred and sixty and seventy-eight one-hundredths feet, thence one hundred and eighty-seven degrees no minutes one hundred and sixty-nine and fifty-four one-hundredths feet along the government road, thence on the arc of a circular curve to the left with a radius of three hundred and fifty-one and eight one-hundredths feet and a central angle of eighty-two degrees thirty minutes the direct azimuth and distance being three hundred and twenty-five degrees forty-five minutes four hundred and sixty-two and ninety-seven one-hundredths feet, thence one hundred and ninety-four degrees thirty minutes five hundred and seventy-nine feet, thence one hundred and four degrees thirty minutes three hundred feet, thence one hundred and ninety-four degrees thirty minutes two hundred feet, thence two hundred eighty-four degrees thirty minutes three hundred feet, thence one hundred and ninety-four degrees thirty minutes two hundred and fifty-two feet to the point of beginning containing an area of four hundred and one and four hundred and twenty-three one-thousandths acres more or less. [Am May 16, 1934, c 290, §1, 48 Stat 777; Aug. 29, 1935, c 810, §1, 49 Stat 966; Jul. 10, 1937, c 482, 50 Stat 497; Nov. 26, 1941, c 544, §1, 55 Stat 782; May 31, 1944, c 216, §2, 58 Stat 260; Jun. 3, 1948, cc 384, 397, 62 Stat 295, 303; Jul. 9, 1952, c 614, §§1, 2, 66 Stat 511; am L 1963, c 207, §§2, 5]

WITHDRAWALS OF AVAILABLE LAND

The Act of May 31, 1944, c 216, §2, 58 Stat. 260, repealed so much of the above section as designates the lands hereinafter described as "available lands," and restored such lands to their previous status under the control of the Territory of Hawaii. The lands so restored on the island of Hawaii are:

Those portions of Keaukaha tract 1, being additions to the Hilo airplane landing field, comprising several parcels of land as follows:

Parcel 1. Land situated at Keaukaha, tract 1, Waiakea, South Hilo, island of Hawaii, State of Hawaii, being portions of lots 96, 97, 182, 183, 184, 185, Desha Avenue, and twenty-five foot alley, of the Keaukaha residence lots, as shown on government survey registered maps 2723 and 3017, on file in the department of accounting and general services at Honolulu.

Beginning at the south corner of this piece of land and on the west boundary of the Hawaiian home land, the true azimuth and distance from the northwest corner of the Hilo airport addition, as shown on government survey registered maps 2723 and 3017 on file in the department of accounting and general services at Honolulu, and on the south side of Kamehameha Avenue, being one hundred and eighty degrees no minutes four hundred and three and thirty-one one-hundredths feet, and the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halai" being two thousand five hundred and twenty and thirty-one one-hundredths feet north and fifteen thousand five hundred and fifty-three one-hundredths feet east, thence running by azimuths measured clockwise from true south:

1. One hundred and eighty degrees no minutes six hundred and fifteen and ninety-five one-hundredths feet along Government land and tract A of grant deeded by Territory of Hawaii to Hilo Railroad Company;

2. Three hundred and ten degrees forty-two minutes four hundred and one and sixty-six one-hundredths feet along the remainders of Desha Avenue, lots 96, 97, twenty-five-foot alley, and lot 182 of the Keaukaha residence lots; and

3. Forty degrees forty-two minutes four hundred and sixty-six and ninety-seven one-hundredths feet along the remainders of lots 182, 183, 184, 185, and Desha Avenue and the Keaukaha residence lots to the point of beginning, and containing an area of two and one hundred and fifty-five one-thousandths acres, more or less.

Parcel 2. Land situated on the south side of Kamehameha Avenue, at Keaukaha, tract 1, Waiakea, South Hilo, Island of Hawaii, State of Hawaii, being all of lots 449 to 486, inclusive, all of lots 546 to 564, inclusive, and portions of Kauhane, Spencer, Pua, and Kamaka Avenues of the Keaukaha residence lots, as shown on Government Survey Registered Maps 2723 and 3017, on file in the department of accounting and general services at Honolulu.

Beginning at the northwest corner of this piece of land; being also the southwest corner of Kamehameha and Kauhane Avenues, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halai" being two thousand one hundred and seventeen feet north and sixteen thousand eight hundred and eighty feet east, thence running by azimuths measured clockwise from true south:

1. Two hundred and seventy degrees no minutes two thousand and seventeen and eighty-five one-hundredths feet along the south side of Kamehameha Avenue;

2. Three hundred and sixty degrees no minutes four hundred and fifty feet along lots 448 and 487 of the Keaukaha residence lots;

3. Three hundred and sixty degrees no minutes fifty feet across Kamaka Avenue;
4. Three hundred and sixty degrees no minutes two hundred and twenty-five feet along lot 545 of the Keaukaha residence lots;
5. Ninety degrees no minutes three hundred and ninety-two and forty-eight one-hundredths feet along lots 583, 582, 581, and 580 of the Keaukaha residence lots;
6. Ninety degrees no minutes fifty feet across Pua Avenue;
7. Ninety degrees no minutes eight hundred and one and fifteen one-hundredths feet along lots 579, 578, 577, 576, 575, 574, 573, and 572, of the Keaukaha residence lots;
8. Ninety degrees no minutes fifty feet across Spencer Avenue;
9. Ninety degrees no minutes six hundred and seventy-four and twenty-two one-hundredths feet along lots 571, 570, 569, 568, 567, 566, and 565, of the Keaukaha residence lots;
10. Ninety degrees no minutes fifty feet across Kauhane Avenue; and
11. One hundred and eight degrees no minutes seven hundred and twenty-five feet along Puuhala Reserve and the present Hilo airport addition, as shown on Government Survey Registered Maps 2723 and 3017 on file in the department of accounting and general services at Honolulu, to the point of beginning, and containing an area of thirty-three and five hundred and eighty-five one-thousandths acres, more or less. -

Parcel 3. As returned to the Commissioner of Public Lands of the Territory of Hawaii by resolution numbered 78 of the Hawaiian Homes Commission, dated May 13, 1942. Land situated at Keaukaha, tract 1, Waiakea, South Hilo, Island of Hawaii, State of Hawaii, being the whole of lots 446, 447, 448, 487, 488, 489, 543, 544, 545, 584, 585, and 586 and portions of lots 581, 582, and 583, and a portion of Kamaka Avenue, of the Keaukaha residence lots, as shown on Government Survey Registered Maps 2723 and 3017, more particularly described as follows:

Beginning at the northeast corner of this piece of land, being also the northeast corner of lot 446 and the southwest corner of Kamehameha and Baker Avenues, the true azimuth and distance from the northwest corner of Hilo airport addition (of twenty and fifty-four one-hundredths acres and on the south side of Kamehameha Highway), as shown on Government Survey Registered Maps 2723 and 3017, being two hundred and seventy degrees no minutes and three thousand six hundred and eighty-eight and seventy one-hundredths feet, and the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halai" being two thousand one hundred and seventeen feet north and nineteen thousand one hundred and ninety-two and twenty-three one-hundredths feet east, thence running by azimuths measured clockwise from true south:

1. Three hundred and sixty degrees no minutes four hundred and fifty feet along the west side of Baker Avenue;
2. Three hundred and sixty degrees no minutes fifty feet across Kamaka Avenue;
3. Three hundred and sixty degrees no minutes four hundred and fifty feet along the west side of Baker Avenue;
4. Ninety degrees no minutes two hundred and ninety-four and thirty-eight one-hundredths feet along the north side of Kawika Avenue;
5. One hundred and eighty degrees no minutes one hundred and twelve and fifty one-hundredths feet along lot 583 of the Keaukaha residence lots;
6. One hundred and ten degrees fifty-five minutes three hundred and fifteen and thirteen one-hundredths feet along the remainders of lots 583, 582, and 581 of the Keaukaha residence lots;
7. Two hundred and seventy degrees no minutes two hundred and ninety-four and thirty-six one-hundredths feet along lots 548, 547, and 546 of the Keaukaha residence lots;
8. One hundred and eighty degrees no minutes two hundred and twenty-five feet along lot 546 of the Keaukaha residence lots;
9. One hundred and eighty degrees no minutes fifty feet across Kamaka Avenue;
10. One hundred and eighty degrees no minutes four hundred and fifty feet along lots 486 and 449 of the Keaukaha lots to the south side of Kamehameha Avenue; and
11. Two hundred and seventy degrees no minutes two hundred and ninety-four and thirty-eight one-hundredths feet along the south side of Kamehameha Avenue to the point of beginning and containing an area of six and eighty one-hundredths acres.

Parcel 4. As returned to the Commissioner of Public Lands of the Territory of Hawaii by resolution numbered 78 of the Hawaiian Homes Commission, dated May 13, 1942. Land situated at Keaukaha, tract 1, Waiakea, South Hilo, Island of Hawaii, State of Hawaii, being the whole of lots 93, 94, 95, 98, 99, 100, 101, and 102 and portions of lots 92, 96, 97, and 103 and a portion of Desha Avenue of the Keaukaha residence lots, as shown on Government Survey Registered Maps 2723 and 3017, more particularly described as follows:

Beginning at the northwest corner of this piece of land, being also the northwest corner of lot 94 and on the southeast side of twenty-five-foot road. the true azimuth and distance from the northwest corner of Hilo airport addition (of twenty and fifty-four one-hundredths acres and on the south side of Kamehameha Highway), as shown on Government Survey Registered Maps 2723 and 3017, being one hundred and eighty degrees no minutes one thousand seven hundred and fifty-one and eighty-seven one-hundredths feet, and the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halai" being three thousand eight hundred and sixty-eight and eighty-seven one-hundredths feet north and fifteen thousand five hundred and three and fifty-three one-hundredths feet east, thence running by azimuths measured clockwise from true south:

1. Two hundred and forty-three degrees fifty minutes one hundred and seventy-seven and

ninety-three one-hundredths feet along the southeast side of twenty-five-foot road;

2. Three hundred and thirty-three degrees fifty minutes two hundred and thirty-five and sixty one-hundredths feet along lot 92 of the Keaukaha residence lots;

3. Two hundred and forty-three degrees fifty minutes one hundred feet along the remainder of lot 92 of the Keaukaha residence lots;

4. Three hundred and thirty-three degrees fifty minutes two hundred feet along lot 91 of the Keaukaha residence lots;

5. Three hundred and thirty-three degrees fifty minutes fifty feet across Desha Avenue;

6. Two hundred and forty-three degrees fifty minutes one hundred feet along the southeast side of Desha Avenue;

7. Three hundred and thirty-three degrees fifty minutes two hundred and thirty-five and sixty one-hundredths feet along lot 103 of the Keaukaha residence lots;

8. Two hundred and forty-three degrees fifty minutes one hundred feet along the remainder of lot 103 of the Keaukaha residence lots;

9. Three hundred and thirty-three degrees fifty minutes two hundred feet along the southwest side of Kauhane Avenue;

10. Sixty-three degrees fifty minutes six hundred and eighty-eight and thirty-six one-hundredths feet along the northwest side of twenty-five-foot road;

11. One hundred and thirty degrees forty-two minutes two hundred and eighty-six and seventy-three one-hundredths feet along the remainders of lots 97 and 96 and Desha Avenue of the Keaukaha residence lots; and

12. One hundred and eighty degrees no minutes seven hundred and thirty-two and sixty-one one-hundredths feet along Government land and tract A of grant deed by the Territory of Hawaii to Hilo Railroad Company to the point of beginning and containing an area of ten and eight hundred and forty-nine one-thousandths acres.

The Act of June 12, 1948, c 458, 62 Stat. 387, withdrew certain land as available land. The Act provided:

"That the portion of Hawaiian Homes Commission land of Waiakea-kai or Keaukaha, South Hilo, Hawaii, Territory of Hawaii, more fully described as follows, is withdrawn as 'available land' within the meaning of the Hawaiian Homes Commission Act of 1920 (42 Stat. 108), as amended, and is hereby restored to its previous status under the control of the Territory of Hawaii:

"Portion of Hawaiian home land of Keaukaha, tract 2, Waiakea, South Hilo, Island of Hawaii, Territory of Hawaii, as returned to the Commissioner of Public Lands of the Territory of Hawaii by Resolution numbered 85 of the Hawaiian Homes Commission, dated July 18, 1944, and more particularly described as follows:

"Beginning at a spike at the northwest corner of this tract of land and on the southeast corner of the intersection of Nene and Akepa Streets, the coordinates of said point of beginning referred to Government Survey Triangulation Station 'Halai' being five thousand two hundred and eight and twenty-one one-hundredths feet north and twenty-four thousand eight hundred and eighteen and six one-hundredths feet east, and running by azimuths measured clockwise from true south:

"1. Two hundred and ninety degrees eleven minutes five hundred and sixty-one and eighty-two one-hundredths feet along the south side of Nene Street;

"2. Thence along same on a curve to the left with a radius of one thousand four hundred and sixty-five and four-tenths feet, the chord azimuth and distance being two hundred and sixty-eight degrees thirty-seven minutes one thousand and seventy-seven and thirty one-hundredths feet;

"3. Two hundred and forty-seven degrees three minutes five hundred and ninety-six and sixty-two one-hundredths feet along same;

"4. Three hundred and sixty degrees no minutes one thousand two hundred and thirty-seven and eighty-five one-hundredths feet;

"5. Ninety degrees no minutes two thousand one hundred and fifty-three and sixty-nine one-hundredths feet;

"6. One hundred and eighty degrees no minutes one thousand one hundred and seventy-three and four one-hundredths feet along the east side of the proposed extension of Akepa Street to the point of beginning, and containing an area of fifty acres, more or less.

"Section 2. Notwithstanding the foregoing provisions of this Act, if, at any time, in the opinion of the Commissioner of Public Lands, use of the above described lands has been discontinued by the Department of Commerce, upon the making of such a determination by the Commissioner of Public Lands such lands shall become available lands within the meaning of Section 203 of title II of the Hawaiian Homes Commission Act, 1920, as amended."

The Act of August 29, 1935, c 819, §1, 49 Stat. 966, and the Act of May 31, 1944, c 216, §2, 58 Stat. 260, repealed so much of the above section as designates the lands hereinafter described as "available lands", and restored such lands to their previous status under the control of the Territory of Hawaii. The lands so restored on the Island of Molokai as of August 29, 1935 are:

Those portions of Hoolehua, apana 2, and Palaau, apana 2, comprising the Molokai airplane landing field as set aside for public purposes by Executive Order Numbered 307 of the Governor of the Territory of Hawaii, dated December 15, 1927, consisting of two hundred four and nine-tenths acres, more or less, and particularly described as follows:

Beginning at a point on the southeast corner of the said land, from which the azimuth (measured clockwise from true south) and distance to United States Coast and Geodetic Survey Triangulation Station "Middle Hill" (Kualapuu) is two hundred and seventy-two degrees twenty-three minutes thirty-nine seconds, twelve thousand seven hundred twenty and nine-tenths feet, thence from said point of beginning by metes and bounds, eighty-five degrees ten minutes thirty seconds,

three thousand four hundred and twenty-seven feet; one hundred and eighty degrees fifty-six minutes thirty seconds, two thousand six hundred thirty and two-tenths feet; two hundred and seventy-nine degrees fifty-five minutes thirty seconds, four thousand nine hundred seven and three-tenths feet; three hundred and forty-six degrees twenty minutes, three hundred forty-two and three-tenths feet near west edge of Kakainapahao Gulch; three degrees twenty-six minutes, four hundred twenty-seven and one-tenth feet; eighty-three degrees twenty-four minutes, one thousand four hundred sixty-eight and two tenths feet; five degrees fifty-eight minutes, five hundred seventy-one and three-tenths feet to the point of beginning.

The land so restored on the Island of Molokai as of May 31, 1944 is:

That portion of Palaau, Apana 2, being an addition to the Molokai airplane landing field, as follows:

Parcel 1. As returned to the Commissioner of Public Lands of the Territory of Hawaii by resolution numbered 68 of the Hawaiian Homes Commission, dated March 3, 1941, and consisting of thirteen and five hundred and twenty-seven one-thousandths acres, more or less, more particularly described as follows:

Beginning at the southeast corner of this piece of land, on the west boundary of the present Molokai airport, the true azimuth and distance from the northwest corner of the Molokai airport (Executive Order Numbered 809) being no degrees fifty-six minutes thirty seconds two hundred and forty-two feet, and the coordinates of said point of beginning referred to Government Survey Triangulation Station "Middle Hill" being one and fifteen one-hundredths feet north and sixteen thousand one hundred and twenty-eight and one one-hundredths feet west, thence running by true azimuths measured clockwise from south:

(1) Sixty degrees twenty-five minutes eight hundred and forty-one and seventy-four one-hundredths feet along the remainders of fifty-foot road and lot 170 of the Hawaiian Homes land;

(2) One hundred and eighty degrees fifty-six minutes thirty seconds eight hundred and twelve and sixty-two one-hundredths feet along the remainder of lot 170 of the Hawaiian Homes land;

(3) Two hundred and forty degrees twenty-five minutes eight hundred and forty-one and seventy-four one-hundredths feet along the remainders of Lot 170, Pine Avenue, lot 158 and fifty-foot road of the Hawaiian Homes land, to the west side of the Molokai airport; and

(4) No degrees fifty-six minutes thirty seconds eight hundred and twelve and sixty-two one-hundredths feet along the west side of the present Molokai airport to the point of beginning.

Attorney General Opinions

The term "available lands" does not include land already set apart by Presidential Executive Order at time of enactment of this Act. Att. Gen. Op. 64-44.

§204. Control by department of "available lands"; return to board of land and natural resources, when. Upon the passage of this Act, all available lands shall immediately assume the status of Hawaiian home lands and be under the control of the department to be used and disposed of in accordance with the provisions of this title, except that:

(1) In case any available land is under lease by the Territory of Hawaii, by virtue of section 73 of the Hawaiian Organic Act, at the time of the passage of this Act, such land shall not assume the status of Hawaiian home lands until the lease expires or the board of land and natural resources withdraws the lands from the operation of the lease. If the land is covered by a lease containing a withdrawal clause, as provided in subdivision (d) of section 73 of the Hawaiian Organic Act, the board of land and natural resources shall withdraw such lands from the operation of the lease whenever the department, with the approval of the Secretary of the Interior, gives notice to it that the department is of the opinion that the lands are required by it for the purposes of this title; and such withdrawal shall be held to be for a public purpose within the meaning of that term as used in subdivision (d) of section 73 of the Hawaiian Organic Act;

(2) Any available land, including lands selected by the department out of a larger area, as provided by this Act, as may not be immediately needed for the purposes of this Act, may be returned to the board of land and natural resources and may be leased by it as provided in chapter 171, Hawaii Revised Statutes, or

Any lease by the board of land and natural resources of Hawaiian home lands hereafter entered into shall contain a withdrawal clause, and the lands so leased shall be withdrawn by the board of land and natural resources, for the purpose of this Act, upon the department giving at its option, not less than one nor more than five years' notice of such withdrawal; provided, that the minimum withdrawal-notice period shall be specifically stated in such lease.

In the management of any retained available lands not required for leasing under section 207(a), the department may dispose of such lands to the public, including native Hawaiians, on the same terms, conditions, restrictions and uses applicable to the disposition of public lands as provided in chapter 171; provided, that the department may not sell or dispose of such lands in fee simple except as authorized under section 205 of this Act.

(3) The department shall not lease, use, nor dispose of more than twenty thousand (20,000) acres of the area of Hawaiian home lands, for settlement by native Hawaiians, in any calendar five-year period.

(4) The department may, with the approval of the governor and the Secretary of the Interior, in order to consolidate its holdings or to better effectuate the purposes of this Act, exchange the title to available lands for land, publicly owned, of an equal value. All land so acquired by the department shall assume the status of available lands as though the same were originally designated as such under section 203 hereof, and all lands so conveyed by the department shall assume the status of the land for which it was exchanged. The limitations imposed by section 73 (l) of the Hawaiian Organic Act and the land laws of Hawaii as to the area and value of land that may be conveyed by way of exchange shall not apply to exchanges made pursuant hereto. No such exchange shall be made without the approval of two-thirds of the members of the board of land and natural resources. [Am Mar. 27, 1928, c 142, §1, 45 Stat 246; Jul. 10, 1937, c 482, 50 Stat 503; Feb. 20, 1954, c 10, §1, 68 Stat 16; Jun. 18, 1954, c 319, §1, 68 Stat 262; am L 1963, c 207, §§2, 5(b); am L 1965, c 271, §1; am L 1976, c 24, §1]

Cross References

As to last two sentences, compare §§171-5 and 171-50.

Attorney General Opinions

Hawaiian home lands needed for purposes of the Act are to be used and disposed of in accordance with the Act and are not subject to county zoning requirements. Att. Gen. Op. 72-21.

§205. [Sale or lease, limitations on.] Available lands shall be sold or leased only (1) in the manner and for the purposes set out in this title, or (2) as may be necessary to complete any valid agreement of sale or lease in effect at the time of the passage of this Act; except that such limitations shall not apply to the unselected portions of lands from which the department has made a selection and given notice thereof, or failed so to select and give notice within the time limit, as provided in paragraph (3) of section 204 of this title.*

§206. [Other officers not to control Hawaiian home lands; exception.] The powers and duties of the governor and the board of land and natural

*The reference was to paragraph (3) of section 204 as originally enacted, which fixed a period of eight years after the first meeting of the commission [department]. The first meeting was held September

resources, in respect to lands of the State, shall not extend to lands having the status of Hawaiian home lands, except as specifically provided in this title. [Am L 1963, c 207, §5(a) (b)]

General Note

The Act of July 10, 1937, c 484, 50 Stat 508, provides in part: "That the legislature of the Territory of Hawaii may create a public corporate authority to engage in slum clearance, or housing undertakings, or both, within such Territory.... The legislature... may, without regard to any federal acts restricting the disposition of public lands of the Territory, authorize the commissioner of public lands, the Hawaiian homes commissioner, and any other officers of the Territory having power to manage and dispose of its public lands, to grant, convey, or lease to such authority parts of the public domain, and may provide that any of the public domain or other property acquired by such authority may be mortgaged by it as security for its bonds...."

Attorney General Opinions

Governor's power to set aside public lands by executive order does not extend to Hawaiian home lands. Att. Gen. Op. 75-3.

§207. [Leases to Hawaiians, licenses.] (a) The department is authorized to lease to native Hawaiians the right to the use and occupancy of a tract or tracts of Hawaiian home lands within the following acreage limits per each lessee: (1) not less than one nor more than forty acres of agricultural lands; or (2) not less than one hundred nor more than five hundred acres of first-class pastoral lands; or (3) not less than two hundred and fifty nor more than one thousand acres of second-class pastoral lands; or (4) not less than forty nor more than one hundred acres of irrigated pastoral lands; (5) not more than one acre of any class of land to be used as a residence lot: provided, however, that, in the case of any existing lease of a farm lot in the Kalanianaole Settlement on Molokai, a residence lot may exceed one acre but shall not exceed four acres in area, the location of such area to be selected by the lessee concerned: provided further, that a lease granted to any lessee may include two detached farm lots located on the same island and within a reasonable distance of each other, one of which, to be designated by the department, shall be occupied by the lessee as his home, the gross acreage of both lots not to exceed the maximum acreage of an agricultural or pastoral lot, as the case may be, as provided in this section.*

(b) The title to lands so leased shall remain in the [State]. Applications for tracts shall be made to and granted by the department, under such regulations, not in conflict with any provisions of this title, as the department may prescribe.

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*The text of subsection (a) as amended by L 1976, c 23, to be effective with the consent of the United States, reads: (a) The department is authorized to lease to native Hawaiians the right to the use and occupancy of a tract or tracts of Hawaiian home lands within the following acreage limits per each lessee: (1) not less than one nor more than forty acres of agriculture lands; or (2) not less than one hundred nor more than five hundred acres of first-class pastoral lands; or (3) not less than two hundred and fifty nor more than one thousand acres of second-class pastoral lands; or (4) not less than forty nor more than one hundred acres of irrigated pastoral lands; (5) not more than one acre of any class of land to be used as a residence lot; provided, however, that, in the case of any existing lease of a farm lot in the Kalanianaole Settlement on Molokai, a residence lot may exceed one acre but shall not exceed four acres in area, the location of such area to be selected by the department; provided further, that a lease granted to any lessee may include two detached farm lots located on the same island and within a reasonable distance of each other, one of which, to be designated by the department, shall be occupied by the lessee as his home, the gross acreage of both lots not to exceed the maximum acreage of an agricultural or pastoral lot, as the case may be, as provided in this section; provided further, that the department may designate the location of the homesite on residence lots less than 10,000 square feet.

The department shall, whenever tracts are available, enter into such a lease with any applicant who, in the opinion of the department, is qualified to perform the conditions of such lease.

(c) (1) The department is authorized to grant licenses for terms of not to exceed twenty-one years in each case, to public utility companies or corporations as easements for railroads, telephone lines, electric power and light lines, gas mains, and the like. The department is also authorized to grant licenses for lots within a district in which lands are leased under the provisions of this section, to–

(A) churches, hospitals, public schools, post offices, and other improvements for public purposes;

(B) theaters, garages, service stations, markets, stores, and other mercantile establishments (all of which shall be owned by lessees of the department or by organizations formed and controlled by said lessees).

(2) The department is also authorized, with the approval of the governor, to grant licenses to the United States for terms not to exceed five years, for reservations, roads, and other rights-of-way, water storage and distribution facilities, and practice target ranges: provided, that any such license may be extended from time to time by the department, with the approval of the governor, for additional terms of three years: provided further, that any such license shall not restrict the areas required by the department in carrying on its duties, nor interfere in any way with the department's operation on maintenance activities. [Am Feb. 3, 1923, c 56, §1, 42 Stat 1222; May 16, 1934, c 290, §2, 48 Stat 779; Jul. 10, 1937, c 482, 50 Stat 504; May 31, 1944, c 216, §§3, 4, 58 Stat 264; Jun. 14, 1948, c 464, §§1, 2, 62 Stat 390; Jun. 18, 1954, c 321, §1, 68 Stat 263; Aug 23, 1958, Pub L 85-733, 72 Stat 822; am L 1963, c 207, §2]

General Note

In addition to the provisions herein made for leases to native Hawaiians, the Act of June 20, 1938, c 530, §3, 52 Stat 781, after providing for the Kalapana extension to the Hawaii National Park, authorized the Secretary of the Interior to lease home sites herein to native Hawaiians under certain circumstances.

Revision Note

"State" substituted for "United States" in view of section 5(b) of Hawaii Admission Act.

Cross References

Homesteaders Cooperative Association use of Hoolehua Store building free of rent, subject to certain conditions, see L 1959, SR 17.

Attorney General Opinions

Section does not authorize the commission to grant a permit to occupy Hawaiian homes premises from month to month on a monthly charge basis. Att. Gen. Op. 61-64.

Commission has no authority to permit a lessee to subdivide her homestead tract and sublease a portion thereof to her daughter. Att. Gen. Op. 61-65.

Neither the department nor any lessee is authorized to develop multi-unit dwellings. Att. Gen. Op. 62-9.

Lands not needed for purposes of Act could be subjected to county zoning regulations. Att. Gen. Op. 72-21.

§208. Conditions of leases. Each lease made under the authority granted the department by the provisions of section 207 of this title, and the tract in respect to which the lease is made, shall be deemed subject to the following conditions, whether or not stipulated in the lease:

(1) The original lessee shall be a native Hawaiian, not less than twenty-one years of age. In case two lessees either original or in succession marry, they shall choose the lease to be retained, and the remaining lease shall be transferred or cancelled in accordance with the provisions of succeeding sections.

(2) The lessee shall pay a rental of one dollar a year for the tract and the lease shall be for a term of ninety-nine years.

(3) The lessee shall occupy and commence to use or cultivate the tract as his home or farm within one year after the lease is made. The lessee of agricultural lands shall plant and maintain not less than five, ten, fifteen and twenty trees per acre of land leased and the lessee of pastoral lands shall plant and maintain not less than two, three, four, and five trees per acre of land leased during the first, second, third and fourth years, respectively, after the date of lease. Such trees shall be of types approved by the department and at locations specified by the department's agent. Such planting and maintenance shall be by or under the immediate control and direction of the lessee. Such trees shall be furnished by the department free of charge.

(4) The lessee shall thereafter, for at least such part of each year as the department shall by regulation prescribe, so occupy and use or cultivate the tract on his own behalf.

(5) The lessee shall not in any manner transfer to, or mortgage, pledge, or otherwise hold for the benefit of, any other person or group of persons or organizations of any kind, except a native Hawaiian or Hawaiians, and then only upon the approval of the department, or agree so to transfer, mortgage, pledge, or otherwise hold, his interest in the tract. Such interest shall not, except in pursuance of such a transfer, mortgage, or pledge to or holding for or agreement with a native Hawaiian or Hawaiians approved of by the department, or for any indebtedness due the department or for taxes, or for any other indebtedness the payment of which has been assured by the department, including loans from governmental agencies where such loans have been approved by the department, be subject to attachment, levy, or sale upon court process. The lessee shall not sublet his interest in the tract or improvements thereon.

(6) The lessee shall pay all taxes assessed upon the tract and improvements thereon. The department may in its discretion pay such taxes and have a lien therefor as provided by section 216 of this act.

(7) The lessee shall perform such other conditions, not in conflict with any provision of this title, as the department may stipulate in the lease: provided, however, that an original lessee shall be exempt from all taxes for the first seven years from date of lease.

(8) The department may assure the repayment of loans made by governmental agencies or by private lending institutions, defined as banks, building or savings and loan associations, trustees, guardians, trust companies, insurance companies, fiduciaries, and all other persons or organizations having moneys to invest, to lessees when such loans have been approved by the department, up to the limits prescribed in section 215; provided that the lessee has no indebtedness due the department and the department shall not make any loans to the lessee while such assured loans are outstanding; provided further that upon receipt of notice of default in the payment of such assured loans, the department may, upon failure of the lessee to cure the default within 60 days, cancel the lease and thereupon use its best efforts to redispose of the tract to a qualified and responsible native Hawaiian or Hawaiians as a new lessee who will assume the obligation

of the outstanding debt thereby assured, and make payments to the governmental agency or the private lending institution from available funds either for the monthly payments as they become due and payable or for the amount of the debt. In no event shall the aggregate amount assured by the department exceed $8,000,000. [Am Jul. 10, 1937, c 482, 50 Stat 504; Nov. 26, 1941, c 544, §2, 55 Stat 783; Aug. 21, 1958, Pub L 85-710, 72 Stat 706; am L 1963, c 207, §2; am L 1967, c 146, §§1, 2; am L 1973, c 66, §1; am L 1974, c 175, §1]

Attorney General Opinions

Lessee is prohibited from subdividing homestead tract and subleasing a portion thereof to her daughter. Att. Gen. Op. 61-65.

Bank of Hawaii is not an eligible mortgagee; improvements may not be treated as personalty. Att. Gen. Op. 65-15.

§209. [Successors to lessees.] (1) Upon the death of the lessee, his interest in the tract or tracts and the improvements thereon, including growing crops (either on the tract or in any collective contract or program to which the lessee is a party by virtue of his interest in the tract or tracts), shall vest in the relatives of the decedent as provided in this paragraph. From the following relatives of the lessee, husband and wife, children, widows or widowers of the children, grandchildren, brothers and sisters, widows or widowers of the brothers and sisters, or nieces and nephews,–the lessee shall designate the person or persons to whom he directs his interest in the tract or tracts to vest upon his death. Such person or persons must be qualified to be a lessee of Hawaiian home lands: provided, that Hawaiian blood requirements shall not apply to the descendants of those who are not native Hawaiians but who were entitled to the leased lands under the provisions of section 3 of the Act of May 16, 1934 (48 Stat. 777, 779), as amended: provided, further, that such person or persons need not be twenty-one years of age. Such designation must be in writing, must be specified at the time of execution of such lease with a right in such lessee in similar manner to change such beneficiary at any time and shall be filed with the department and approved by the department in order to be effective to vest such interests in the successor or successors so named.

In the absence of such a designation as approved by the department, the department shall select from the relatives of the lessee in order named above as limited by the foregoing paragraph one or more persons who are qualified to be lessees of Hawaiian home lands, except as hereinabove provided, as the successor or successors of the lessee's interest in the tract or tracts, and upon the death of the lessee, his interest shall vest in the person or persons so selected. The department may select such a successor or successors after the death of the lessee, and the rights to the use and occupancy of the tract or tracts may be made effective as of the date of the death of such lessee.

In the case of the death of a lessee leaving no such relative qualified to be a lessee of Hawaiian home lands, the land subject to the lease shall resume its status as unleased Hawaiian home lands and the department is authorized to lease such land to a native Hawaiian or Hawaiians as provided in this Act.

Upon the death of a lessee leaving no such relative qualified to be a lessee of Hawaiian home lands, or the cancellation of a lease by the department, or the surrender of a lease by the lessee, the department shall appraise the value of all such improvements and growing crops and shall pay to the legal representative of the deceased lessee, or to the previous lessee, as the case may be, the value

thereof, less any indebtedness to the department, or for taxes, or for any other indebtedness the payment of which has been assured by the department, from the deceased lessee or the previous lessee. Such payments shall be made out of the loan fund and shall be considered an advance therefrom reimbursable out of payments made by the successor or successors to the tract involved.

Such appraisal shall be made by three appraisers, one of which shall be named by the department, one by the previous lessee or the legal representative of the deceased lessee, as the case may be, and the third shall be selected by the two appraisers hereinbefore mentioned.

(2) After the cancellation of a lease by the department in accordance with the provisions of sections 210 and 216 of this title, or the surrender of a lease by a lessee, the department is authorized to transfer the lease or to issue a new lease to any qualified Hawaiian regardless of whether or not he is related in any way by blood or marriage to the previous lessee.

(3) Should any successor or successors to a tract be a minor or minors, the department may appoint a guardian therefor, subject to the approval of the court of proper jurisdiction. Such guardian shall be authorized to represent the successor or successors in all matters pertaining to the leasehold: provided, that said guardian shall, in so representing such successor or successors, comply with the provisions of this title and the stipulations and provisions contained in the lease, except that said guardian may not be a native Hawaiian as defined in section 201 of this title. [Am Jul. 10, 1937, c 482, 50 Stat 504; Nov. 26, 1941, c 544, §3, 55 Stat 783; Jul. 9, 1952, c 614, §4, 66 Stat 514; am L 1963, c 207, §2]

Attorney General Opinions

A lessee surrendering a lease is entitled to payment for appraised value of pineapple crops growing on tract at date of surrender less deduction for indebtedness. Att. Gen. Op. 61-66.

On discretion of commission in the selection of a successor to a lessee who dies without designating his own successor. Att. Gen. Op. 61-75.

Distribution of "pineapple money" which includes "advances" for expenditures. Att. Gen. Op. 61-88.

Person claiming to be common-law wife under relationship established in Hawaii is not a qualified successor to lessee. Att. Gen. Op. 73-5.

"Children" construed. Att. Gen. Op. 73-18.

§210. [Cancellation of leases.] Whenever the department has reason to believe that any condition enumerated in section 208, or any provision of section 209, of this title has been violated, the department shall give due notice and afford opportunity for a hearing to the lessee of the tract in respect to which the alleged violation relates or to the successor of the lessee's interest therein, as the case demands. If upon such hearing the department finds that the lessee or his successor has violated any condition in respect to the leasing of such tract, the department may declare his interest in the tract and all improvements thereon to be forfeited and the lease in respect thereto canceled, and shall thereupon order the tract to be vacated within a reasonable time. The right to the use and occupancy of the Hawaiian home lands contained in such tract shall thereupon revest in the department and the department may take possession of the tract and the improvements thereon. [Am L 1963, c 207, §2]

§211. [Community pastures.] The department shall, when practicable, provide from the Hawaiian home lands a community pasture adjacent to each district in which agricultural lands are leased, as authorized by the provisions of section 207 of this title. [Am L 1963, c 207, §2]

§212. [Lands returned to control of board of land and natural resources.] The department may return any Hawaiian home lands not leased as authorized by the provisions of section 207 of this title to the control of the board of land and natural resources. Any Hawaiian home lands so returned shall, until the department gives notice as hereinafter in this section provided, resume and maintain the status of public lands in accordance with the provisions of the [Hawaii Revised Statutes], except that any such lands may be disposed of under a general lease only. Each such lease, whether or not stipulated therein, shall be deemed subject to the right and duty of the board of land and natural resources to terminate the lease and return the lands to the department whenever the department, with the approval of the Secretary of the Interior, gives notice to the board that the department is of the opinion that the lands are required by it for leasing as authorized by the provisions of section 207 of this title or for a community pasture. [Am L 1963, c 207, §§2, 5(b)]

Revision Note

"Hawaii Revised Statutes" substituted for "the Hawaiian Organic Act and the Revised Laws of Hawaii 1915".

Cross References

Notice, see §204.

Attorney General Opinions

Governor does not have power to set aside by executive order any of the returned Hawaiian home lands. Att. Gen. Op. 75-3.

§213. Hawaiian home-loan fund; Hawaiian home-development fund; Hawaiian home-operating fund; administration account; Hawaiian home-farm loan fund; Hawaiian home-commercial loan fund; Hawaiian home-repair loan fund; Anahola-Kekaha loan fund; Hawaiian loan guarantee fund; Papakolea home-replacement loan fund; Keaukaha-Waiakea home-replacement loan fund; Keaukaha-Waiakea home-construction fund; the statewide replacement loan fund; and the Hawaiian home general home loan fund. (a) There are hereby established in the treasury of the State eleven revolving funds to be known as the Hawaiian home-loan fund, the Hawaiian home-operating fund, the Hawaiian home-farm loan fund, the Hawaiian home-commercial loan fund, the Hawaiian home-repair loan fund, the Anahola-Kekaha loan fund, the Papakolea home-replacement loan fund, the Keaukaha-Waiakea home-replacement loan fund, the Keaukaha-Waiakea home-construction fund, statewide replacement loan fund, and the Hawaiian home general home loan fund, and three special funds to be known as the Hawaiian home-development fund, the Hawaiian home-administration account, and the Hawaiian loan guarantee fund.

(b) Hawaiian home-loan fund. Thirty per cent of the state receipts derived from the leasing of cultivated sugar-cane lands under any other provisions of law or from water licenses, shall be deposited into the Hawaiian home-loan fund until the aggregate amount of the fund (including in such amount the principal of all outstanding loans and advances, and all transfers which have been made from this fund to other funds for which this fund has not been or need not be reimbursed) shall equal $5,000,000. In addition to these moneys, there shall be covered into the loan fund the installments of principal paid by lessees upon

loans made to them as provided in section 215(2), or as payments representing reimbursements on account of advances made pursuant to section 209(1), but not including interest on such loans or advances. The moneys in the fund shall be available only for loans to lessees as provided for in this Act, and for the payments provided for in section 209(1), and shall not be expended for any other purpose whatsoever, except as provided in subsections (c) and (d) of this section.

Thirty per cent of the state receipts derived from the leasing of cultivated sugar-cane lands under any other provisions of law or from water licenses, over and above the present ceiling in the Hawaiian home-loan fund of $5,000,000, which additional amount is hereinafter called "Additional Receipts", shall be deposited into a special revolving account within the Hawaiian home-loan fund until the aggregate amount of the Additional Receipts so deposited (including the principal and advances made from the Additional Receipts but not from moneys borrowed under (6) hereinbelow, and all transfers which have been made from the Additional Receipts to other funds for which this fund has not been or need not be reimbursed) shall equal $5,000,000. In addition to these moneys there shall be covered into the special revolving account of the loan fund, moneys borrowed under (6) hereinafter, installments of principal and interest paid by borrowers upon loans from the special revolving account, whether from the Additional Receipts or such borrowed moneys. To the extent as stated hereinafter, the Additional Receipts shall be repaid to the general fund of the State upon proper action by the legislature directing repayment.

Eighty-five per cent of the annual Additional Receipts, hereinafter called the "Additional Receipts - Development Fund Portion", is to be transferred to the Hawaiian home-development fund, to be used in accordance with the amended provisions of subsection (c) of this section.

Fifteen per cent of the annual Additional Receipts, hereinafter called the "Additional Receipts - Loan Fund Portion," shall be retained in the special revolving fund and be used for and in connection with the repair or maintenance or purchase or erection or improvement of dwellings on either Hawaiian home lands or non-Hawaiian home lands, whether owned or leased. In furtherance of the purposes herein, the department may do any one or more of the following, with moneys from the Additional Receipts - Loan Fund Portion and any borrowed moneys under (6) hereinbelow:

(1) The department may extend the benefits of the special revolving account only to native Hawaiians as defined in the Act;

(2) The department may loan, or guarantee the repayment of or otherwise underwrite any authorized loan, up to a maximum of $35,000; provided, that where, upon the death of a lessee living on Hawaiian home lands who leaves no relatives qualified to be a lessee on Hawaiian home lands, or the cancellation of a lease by the department, or the surrender of a lease by the lessee, the department shall be authorized to make payment and to permit assumption of loan in excess of $35,000 under and in accordance with the provisos of section 215(1), subject, as stated, to the provisions of section 215(3);

(3) Where the dwelling is on Hawaiian home lands, anything in the Act to the contrary notwithstanding, either the department, other governmental agencies, or private lending institutions may make loans, and the loans made in connection with the repair or maintenance or purchase or erection or improvement of dwellings shall be subject to, all applicable provisions of the Act, including but not limited to the provisions of sections 207, 208, 209, 210, 215, 216, and

217, and to such legislative amendments of the Act herein or hereafter enacted, provided such amendments do not change the qualifications of lessees or constitute a reduction or impairment of the Hawaiian home-loan fund, Hawaiian home-operating fund or Hawaiian home-development fund or otherwise require the consent of the United States. Loans made to lessees by governmental agencies or private lending institutions shall be approved by the department, and the department may assure the payment of such loans, provided that the department shall reserve the following rights, among others: the right of succession to the lessee's interest and assumption of the contract of loan; right to require that written notice be given to the department immediately upon default or delinquency of the lessee; and any other rights necessary to protect the monetary and other interests of the department;

(4) Where the dwelling is on non-Hawaiian home lands, anything in the Act to the contrary notwithstanding, either the department, other governmental agencies, or private lending institutions may make loans, and in connection with such loans, the department shall be governed by, and the loans made in connection with the repair or maintenance or purchase or erection or improvement of dwellings shall be subject to, such terms and conditions as the department may, by rules and regulations not inconsistent with the provisions of this legislative amendment to such Act, promulgate; provided, the department shall require any loan made or guaranteed or otherwise underwritten to be secured adequately and suitably by a first or second mortgage or other securities;

(5) The department shall establish interest rate or rates at two and one-half per cent a year or higher, in connection with authorized loans on Hawaiian home lands or non-Hawaiian home lands;

(6) The department may borrow and deposit into the special revolving account for the purposes of repairing or maintaining or purchasing or erecting or improving dwellings on Hawaiian home lands and non-Hawaiian home lands and related purposes as provided for in the second paragraph of (8) hereinafter, from governmental agencies or private lending institutions and if necessary in connection therewith, to pledge, secure, or otherwise guarantee the repayment of moneys borrowed with all or a portion of the estimated sums of Additional Receipts for the next ensuing ten years from the date of borrowing, less any portion thereof previously encumbered for similar purposes;

(7) The department may purchase or otherwise acquire, or agree so to do, before or after default, any notes and mortgages or other securities covering loans made by other governmental agencies or by private lending institutions to native Hawaiians or guarantee the repayment of or otherwise underwrite the loans and accept the assignment of any notes and mortgages or other securities in connection therewith;

(8) The department may exercise the functions and reserved rights of a lender of money or mortgagee of residential property in all direct loans made by the department with funds from the Additional Receipts - Loan Fund Portion or with funds borrowed under (6) hereinabove (but not with funds from the original $5,000,000, unless such exercise is authorized by the Act), or in all loans made by other governmental agencies or by private lending institutions to native Hawaiians. The functions and reserved rights shall include but not be limited to, the purchasing, repurchasing, servicing, selling, foreclosing, buying upon foreclosure, guaranteeing the repayment, or otherwise underwriting, of any loan, protecting of security interest, and after foreclosure, the repairing, renovating, or

modernization and sale of the property covered by the loan and mortgage, to achieve the purposes of this program while protecting the monetary and other interests of the department.

The Additional Receipts - Loan Fund Portion, less any amounts thereof utilized to pay the difference in interest rates, discounts, premiums, necessary loan processing expenses, and other expenses authorized in this legislative amendment, are subject to repayment to the general fund upon appropriate legislative action or actions directing whole or partial repayment.

(c) Hawaiian home-development fund. Twenty-five per cent of the amount of moneys covered into the Hawaiian home-loan fund annually shall be transferred into the Hawaiian home-development fund. The moneys in such development fund shall be available, with the prior written approval of the governor, for off-site improvements and development; for improvements, additions and repairs to all assets as structures and buildings owned by the department excluding, however, such structures or improvements that the department shall be required to acquire under section 209 of this Act; for engineering and architectural planning to maintain and develop properties; for purchase of equipment of every kind and nature as the department shall deem necessary or proper for its use; for nonrevenue producing improvements to fulfill the intent of the Act not permitted in the various loan funds, the administration account or the operating fund.

With respect to the Additional Receipts - Development Fund Portion, fifteen per cent thereof shall be used, with the prior written approval of the governor, for off-site improvements and development; for improvements, additions and repairs to all assets as structures and buildings owned by the department excluding, however, such structures or improvements that the department shall be required to acquire under section 209 of this Act; for engineering and architectural planning to maintain and develop properties; for purchase of equipment of every kind and nature as the department shall deem necessary or proper for its use; for nonrevenue producing improvements to fulfill the intent of the Act not permitted in the various loan funds, the administration account or the operating fund, and the remaining eighty-five per cent shall be segregated into a special account which may be drawn upon from time to time by the department of education, with prior written approval of the governor, for such educational projects as shall be developed and directed by the department of education after consultation with the University of Hawaii and the department of Hawaiian home lands; provided that such projects shall be directed primarily to the educational improvement of the children of the lessees, the funds to be used primarily at the preschool and elementary grade levels.

Only so much of the Additional Receipts - Development Fund Portion not encumbered at the time of appropriate legislative action directing repayment, shall be repaid to the general fund of the State.

(d) Hawaiian home-operating fund. All moneys received by the department from any other source, except moneys received from the Hawaiian home-administration account, shall be deposited in a revolving fund to be known as the Hawaiian home-operating fund. The moneys in such fund shall be available (1) for construction and reconstruction of revenue-producing improvements, including acquisition therefor of real property and interests therein, such as water rights or other interests; (2) for payment into the treasury of the State of such amounts as are necessary to meet the following charges for state bonds issued for such

revenue-producing improvements, to wit, the interest on such bonds, and the principal of such serial bonds maturing the following year; (3) for operation and maintenance of such improvements, heretofore or hereafter constructed from such funds or other funds; and (4) for the purchase of water or other utilities, goods, commodities, supplies, or equipment and for services, to be resold, rented, or furnished on a charge basis to occupants of Hawaiian home lands. The moneys in the fund may be supplemented by other funds available for, or appropriated by the legislature for, the same purposes. In addition to such moneys, the fund, with the approval of the governor, may be supplemented by transfers made on a loan basis from the home-loan fund. The amounts of all such transfers shall be repaid into the home-loan fund in not exceeding ten annual installments, and the aggregate amount of such transfers outstanding at any one time shall not exceed $500,000. No projects or activities shall be undertaken hereunder except as authorized by sections 220 and 221 or the other provisions of this Act.

(e) Match moneys. The department is authorized and empowered to use moneys in the development and operating funds, with the prior written approval of the governor, to match federal, state, or county funds available for the same purposes and to that end is authorized to enter into such undertaking, agree to such conditions, transfer funds therein available for such expenditure, and do and perform such other acts and things, as may be necessary or required, as a condition to securing match funds for such projects or works.

(f) Hawaiian home-administration account. The entire receipts derived from any leasing of the available lands defined in section 204 shall be deposited into the Hawaiian home-administration account. The moneys in such account shall be expended by the department for salaries and all other administrative expenses of the department, not including structures and other permanent improvements, subject, however, to the following conditions and requirements:

(1) The department shall, at such time as the governor may prescribe, but not later than November 15, preceding each regular session of the legislature, submit to the state director of finance its budget estimates of expenditures for the next ensuing (fiscal period) in the manner and form and as required by state law of state departments and establishments.

(2) The department's budget, if it meets with the approval of the governor, shall be included in the governor's budget report and shall be transmitted to the legislature for its approval.

(3) Upon approval by the legislature of the department's budget estimate of expenditures for the ensuing (fiscal period) the amount thereof shall be available to the department for the (fiscal period) and shall be expendable by the department for the expenses hereinabove provided, or, if no action on the budget is taken by the legislature prior to adjournment, the amount submitted to the legislature, but not in excess of $200,000, shall be available for such expenditures; any amount of money in said account in excess of the amount approved by the legislature for the (fiscal period) or so made available shall be transferred to the Hawaiian home-development fund, such transfer to be made immediately after the amount of moneys deposited in the administration account shall equal the amount approved by the legislature or so made available.

(4) The money in the administration account shall be expended by the department in accordance with state laws, rules, and regulations and practices.

(g) Hawaiian home-farm loan fund. The department shall create a fund of $500,000 out of moneys heretofore appropriated to it by the legislature to

beknown as the "farm loan fund". The moneys in this fund shall be used to make loans to lessees of agricultural tracts leased under the provisions of section 207 of this Act. Such loans shall be subject to restrictions imposed by sections 214 and 215 of this Act.

(h) Hawaiian home-commercial loan fund. The department is authorized to create a fund out of which loans may be made to those holding licenses issued under section 207 of this Act. The loans shall be for theaters, garages, service stations, markets, stores, and other mercantile establishments and these shall all be owned by lessees or by organizations formed and controlled by the lessees. The loans shall be subject to the restrictions imposed by sections 214 and 215 of this Act.

(i) Hawaiian home-repair loan fund. The department shall create a fund of $500,000 out of moneys heretofore appropriated to it by the legislature to be known as the Hawaiian home-repair loan fund. The moneys in this fund shall be used to make loans in amounts not in excess of $10,000 to lessees for repairs to their existing homes and for additions to such homes. Such loans shall be subject to restrictions imposed by sections 214 and 215 of this Act.

(j) Anahola-Kekaha fund. The department shall create a fund of $121,-500 out of moneys heretofore appropriated to it by the legislature to be known as the Anahola-Kekaha fund. The moneys in this fund shall be used to make loans to lessees who are residents of Anahola and Kekaha on the island of Kauai to construct homes upon their residence lots. Such loans shall be subject to the restrictions imposed by sections 214 and 215 of this Act.

(k) The Hawaiian loan guarantee fund. The department is authorized to create a fund to support, if necessary, its guarantee of repayment of loans made by governmental agencies or by private lending institutions to those holding leases or licenses issued under section 207 of this Act. The loan guarantees shall be subject to the restrictions imposed by sections 208, 214, and 215 of this Act. The department's guarantee of repayment shall be adequate security for a loan under any state law prescribing the nature, amount, or form of security or requiring security upon which loans may be made.

(l) Papakolea home-replacement loan fund. The department shall create a fund of $200,000 out of moneys heretofore appropriated to it by the legislature to be known as the Papakolea home-replacement loan fund. The moneys in this fund shall be used to make loans to lessees who are residents of Papakolea on the island of Oahu to construct replacement homes upon their residence lots. Such loans shall be subject to the restrictions imposed by sections 214 and 215 of this Act.

(m) Keaukaha-Waiakea home-replacement loan fund. The department is authorized to create a fund to be known as the Keaukaha-Waiakea home-replacement loan fund. The moneys in this fund shall be used to make loans to lessees who are residents of Keaukaha-Waiakea on the island of Hawaii to construct replacement homes upon their residence lots. Such loans shall be subject to the restrictions imposed by sections 214 and 215 of this Act.

(n) Keaukaha-Waiakea home-construction fund. The department is authorized to create a fund to be known as the Keaukaha-Waiakea home-construction fund. The moneys in this fund shall be used to make loans to lessees to construct homes upon their vacant residence lots. Such loans shall be subject to the restrictions imposed by sections 214 and 215 of this Act.

(o) Statewide replacement loan fund. The department shall create a fund of $5,250,000 out of moneys heretofore appropriated to it by the legislature to be known as the Statewide replacement loan fund. The moneys in this fund shall be used to make loans to lessees to construct replacement homes upon their residence lots. Such loans shall be subject to the restrictions imposed by sections 214 and 215 of this Act.

(p) Hawaiian home general home loan fund. The department shall create a fund to be known as the Hawaiian home general home loan fund. Funds appropriated by the legislature for the construction of homes but not otherwise set aside for a particular fund shall be deposited to this fund. The moneys in this fund shall be used to make loans to lessees for the purposes set forth by the legislature in the enactment appropriating said funds. Such loans shall be subject to the restrictions imposed by sections 214 and 215 of this Act. [Am Feb. 3, 1923, c 56, §2, 42 Stat 1222; Mar. 7, 1928, c 142, §2, 45 Stat 246; Nov. 26, 1941, c 544, §4, 55 Stat 784; Jun. 14, 1948, c 464, §3, 62 Stat 390; Jul. 9, 1952, c 615, §§1, 2, 66 Stat 514; Aug. 21, 1958, Pub L 85-708, 72 Stat 705; am L 1959 1st, c 13, §2; am L 1961, c 183, §2; am L 1963, c 114, §5 and c 207, §§2, 5(a); am L 1965, c 4, §§1, 2; am L 1967, c 146, §3; L 1969, c 114, §1 and c 259, §1; am L 1972, c 76, §1; am L 1973, c 130, §1 and c 220, §1; am L 1974, c 170, §1, c 172, §1, c 174, §1, c 175, §§2, 3 and c 176, §2; am L 1976, c 72, §1]

Amendment Note

Sections 4 and 5 of Act 76, L 1972, omitted herefrom, read as follows:

SECTION 4. These authorizations shall not be construed as irrevocable amendments to the Hawaiian Homes Commission Act of 1920, and any repeal or amendment of these authorizations or any of them, and recall of moneys loaned herein shall not be construed as a present or then reduction or impairment of the funds of the Act.

SECTION 5. The provisions of these legislative amendments are declared to be severable, and if any section, sentence, clause or phrase of these legislative amendments or any of them, or the application thereof to any person or circumstances is held ineffective because there is a requirement for the consent of the Congress to take effect, then, that portion only shall take effect upon the granting of consent of Congress and the effectiveness of the remainder of these legislative amendments or the application thereof shall not be affected.

For similar provisions, see also §§3 and 4, Act 72, SL 1976.

General Note

L. 1965, c. 4 which added the second and following paragraphs to (b) and the second and following paragraphs to (c) also provided as follows:

"Section 3. All provisions of this amendment shall be liberally construed so as to facilitate the maximum number of loans to Hawaiians.

Section 4. The department shall promulgate rules and regulations not inconsistent with the provisions of this legislative amendment to the Act in furtherance of the purposes of this legislative amendment.

Section 5. This authorization shall not be construed as an irrevocable amendment to the Hawaiian Homes Commission Act and any repeal or amendment of the authorization and recall of moneys loaned herein shall not be construed as a present or then reduction or impairment of the funds of the Act."

Revision Note

"Annual" and "fiscal period" substituted for "biennial" and "biennium" to conform to budgetary requirements under the Constitution. L. Sp. 1959, 1st, c. 13, made similar changes to sections of R.L.H. 1955.

Attorney General Opinions

Funds may not be used to subsidize nursery schools. Att. Gen. Op. 62-6.

§214. Loans, purposes of. The department is hereby authorized to make loans from revolving funds to the lessee of any tract, the successor to his interest therein or any agricultural cooperative association all of whose members are lessees. Such loans may be made for the following purposes:

(1) The repair or maintenance or purchase or erection of dwellings on any tract and the undertaking of other permanent improvements thereon;

(2) The purchase of livestock and farm equipment;

(3) Otherwise assisting in the development of tracts and of farm and ranch operations;

(4) The cost of breaking up, planting and cultivating land and harvesting crops, the purchase of seeds, fertilizers, feeds, insecticides, medicines and chemicals for disease and pest control for animals and crops, and related supplies required for farm and ranch operations, the erection of fences and other permanent improvements for farm or ranch purposes and the expense of marketing; and

(5) To assist lessees in the operation or erection of theaters, garages, service stations, markets, stores, and other mercantile establishments, all of which shall be owned by lessees of the department or by organizations formed and controlled by said lessees. [Am L 1962, c 14, §3; am L 1963, c 207, §2; am L 1969, c 259, §2; am L 1972, c 76, §2]

See Amendment Note following section 213.

§215. Conditions of loans. Except as otherwise provided in section 213(i), each contract of loan with the lessee or any successor or successors to his interest in the tract or with any agricultural or mercantile cooperative association composed entirely of lessees shall be held subject to the following conditions whether or not stipulated in the contract loan:

(1) At any one time, the outstanding amount of loans made to any lessee, or successor or successors in interest, for the repair, maintenance, purchase, and erection of a dwelling and related permanent improvements shall not exceed $35,000, for the development and operation of a farm or a ranch shall not exceed $35,000, except that when loans are made to an agricultural cooperative association for the purposes stated in paragraph (4) of section 214, the loan limit shall be determined by the department on the basis of the proposed operations and the available security of the association, and for the development and operation of a mercantile establishment shall not exceed the loan limit determined by the department on the basis of the proposed operations and the available security of the lessee or of the organization formed and controlled by lessees; provided, that where, upon the death of a lessee leaving no relative qualified to be a lessee of Hawaiian home lands, or the cancellation of a lease by the department, or the surrender of a lease by the lessee, the department shall make the payment provided for by section 209(1), the amount of any such payment made to the legal representative of the deceased lessee, or to the previous lessee, as the case may be, shall be considered as part or all, as the case may be, of any such loan to the successor or successors, without limitation as to the above maximum amounts; provided, further, that in case of the death of a lessee, or cancellation of a lease by the department, or the surrender of a lease by the lessee, the successor or successors to the tract shall assume any outstanding loan or loans thereon, if any, without limitation as to the above maximum amounts but subject to paragraph

(2) The loans shall be repaid in periodic installments, such installments to be monthly, quarterly, semi-annual, or annual as may be determined by the department in each case. The term of any loan shall not exceed thirty years. Payments of any sum in addition to the required installments, or payment of the entire amount of the loan, may be made at any time within the term of the loan. All unpaid balances of principal shall bear interest at the rate of two and one-half per cent a year for loans made directly from the Hawaiian home-loan fund, or at the rate of two and one-half per cent or higher as established by law for other loans, payable periodically or upon demand by the department, as the department may determine. The payment of any installment due shall be postponed in whole or in part by the department for such reasons as it deems good and sufficient and until such later date as it deems advisable. Such postponed payments shall continue to bear interest on the unpaid principal at the rate established for the loan.

(3) In the case of the death of a lessee the department shall, in any case, permit the successor or successors to the tract to assume the contract of loan subject to paragraph (1) of this section. In case of the cancellation of a lease by the department or the surrender of a lease by the lessee, the department may, at its option declare all installments upon the loan immediately due and payable, or permit the successor or successors to the tract to assume the contract of loan subject to paragraph (1) of this section. The department may, in such cases where the successor or successors to the tract assume the contract of loan, waive the payment, wholly or in part, of interest already due and delinquent upon said loan, or postpone the payment of any installment thereon, wholly or in part, until such later date as it deems advisable. Such postponed payments shall, however, continue to bear interest on the unpaid principal at the rate established for the loan. Further, the department may, if it deems it advisable and for the best interests of the lessees, write off and cancel, wholly or in part, the contract of loan of the deceased lessee, or previous lessee, as the case may be, where such loans are delinquent and deemed uncollectible. Such write-off and cancellation shall be made only after an appraisal of all improvements and growing crops on the tract involved, such appraisal to be made in the manner and as provided for by section 209(1). In every case, the amount of such appraisal, or any part thereof, shall be considered as part or all, as the case may be, of any loan to such successor or successors, subject to paragraph (1) of this section.

(4) No part of the moneys loaned shall be devoted to any purpose other than those for which the loan is made.

(5) The borrower or the successor to his interest shall comply with such other conditions, not in conflict with any provision of this title, as the department may stipulate in the contract of loan.

(6) The borrower or the successor to his interest shall comply with the conditions enumerated in section 208, and with the provisions of section 209 of this title in respect to the lease of any tract.

(7) Whenever the department shall determine that a borrower is delinquent in the payment of any indebtedness to the department, it may require such borrower to execute an assignment to it, not to exceed, however, the amount of the total indebtedness of such borrower, including the indebtedness to others the payment of which has been assured by the department of all moneys due or to become due to such borrower by reason of any agreement or contract, collective

cancellation of the borrower's lease or interest therein. [Am Feb. 3, 1923, c 56, §3, 42 Stat 1222; Jul. 10, 1937, c 482, 50 Stat 505; Nov. 26, 1941, c 544, §5, 55 Stat 785; Jun. 14, 1948, c 464, §§4, 5, 62 Stat 392; Jul. 9, 1952, c 615, §§3, 4, 66 Stat 514; am L 1962, c 14, §4 and c 18, §2; am L 1963, c 207, §§2, 3; am L 1968, c 29, §2; am L 1972, c 76, §3; am L 1974, c 173, §1; am L 1976, c 72, §2]

Revision Note

See Amendment Note following section 213.

§216. Insurance by borrowers; acceleration of loans; lien and enforcement thereof. The department may require the borrower to insure, in such amount as the department may prescribe, any livestock, machinery, equipment, dwellings and permanent improvements purchased or constructed out of any moneys loaned by the department; or, in lieu thereof, the department may directly take out such insurance and add the cost thereof to the amount of principal payable under the loan. Whenever the department has reason to believe that the borrower has violated any condition enumerated in paragraphs (2), (4), (5) or (6) of section 215 of this title, the department shall give due notice and afford opportunity for a hearing to the borrower or the successor or successors to his interest, as the case demands. If upon such hearing the department finds that the borrower has violated the condition, the department may declare all principal and interest of the loan immediately due and payable notwithstanding any provision in the contract of loan to the contrary. The department shall have a first lien upon the borrower's or lessee's interest in any lease, growing crops, either on his tract or in any collective contract or program, livestock, machinery and equipment purchased with moneys loaned by the department, and in any dwellings or other permanent improvements on any leasehold tract, to the amount of all principal and interest due and unpaid and of all taxes and insurance and improvements paid by the department, and of all indebtedness of the borrower, the payment of which has been assured by the department, including loans from governmental agencies where such loans have been approved by the department. Such lien shall have priority over any other obligation for which the property subject to the lien may be security.

The department may, at such times as it deems advisable, enforce any such lien by declaring the borrower's interest in the property subject to the lien to be forfeited, any lease held by the borrower cancelled, and shall thereupon order such leasehold premises vacated and the property subject to the lien surrendered within a reasonable time. The right to the use and occupancy of the Hawaiian home lands contained in such lease shall thereupon revest in the department, and the department may take possession of the premises covered therein and the improvements and growing crops thereon: provided that the department shall pay to the borrower any difference which may be due him after the appraisal provided for in paragraph (1) of section 209 of this title has been made. [Am Jul. 10, 1937, c 482, 50 Stat 506; Jun. 14, 1948, c 464, §6, 62 Stat 393; am L 1962, c 14, §5; am L 1963, c 207, §2; am L 1967, c 146, §4]

§217. [Ejectment, when: loan to new lessee for improvements.] In case the lessee or borrower or the successor to his interest in the tract, as the case may be, fails to comply with any order issued by the department under the provisions of section 210 or 216 of this title, the department may (1) bring action of ejectment

or other appropriate proceedings, or (2) invoke the aid of the circuit court of the State for the judicial circuit in which the tract designated in the department's order is situated. Such court may thereupon order the lessee or his successor to comply with the order of the department. Any failure to obey the order of the court may be punished by it as contempt thereof. Any tract forfeited under the provisions of section 210 or 216 of this title may be again leased by the department as authorized by the provisions of section 207 of this title, except that the value, in the opinion of the department, of all improvements made in respect to such tract by the original lessee or any successor to his interest therein shall constitute a loan by the department to the new lessee. Such loan shall be subject to the provisions of this section and sections 215, except paragraph (1), and 216 to the same extent as loans made by the department from the Hawaiian loan fund. [Am L 1963, c 207, §§2, 5(a)]

§218. [Lessees ineligible under "farm loan act".] [Repealed L 1967, c 146, §5]

§219. [Agricultural experts.] The department is authorized to employ agricultural experts at such compensation and in such number as it deems necessary. The annual expenditures for such compensation shall not exceed $6,000. It shall be the duty of such agricultural experts to instruct and advise the lessee of any tract or the successor to the lessee's interest therein as to the best methods of diversified farming and stock raising and such other matters as will tend successfully to accomplish the purposes of this title. [Am L 1963, c 207, §2]

§219.1. General assistance. The department is authorized to carry on any activities it deems necessary to assist the lessees in obtaining maximum utilization of the leased lands, including taking any steps necessary to develop these lands for their highest and best use commensurate with the purposes for which the land is being leased as provided for in section 207, and assisting the lessees in all phases of farming and ranching operations and the marketing of their agricultural produce and livestock. [L 1962, c 14, §6; am imp L 1963, c 207, §2]

§220. [Development projects; appropriations by legislature: bonds issued by legislature.] The department is authorized directly to undertake and carry on general water and other development projects in respect to Hawaiian home lands and to undertake other activities having to do with the economic and social welfare of the homesteaders, including the authority to derive revenue from the sale, to others than homesteaders, of water and other products of such projects or activities, or from the enjoyment thereof by others than homesteaders, where such sale of products or enjoyment of projects or activities by others does not interfere with the proper performance of the duties of the department: provided, however, that roads through or over Hawaiian home lands, other than federal-aid highways and roads, shall be maintained by the county or city and county in which said particular road or roads to be maintained are located. The legislature is authorized to appropriate out of the treasury of the State such sums as it deems necessary to augment the Hawaiian home-loan fund, the Hawaiian home-development fund, the Hawaiian home-operating fund, and the Hawaiian home-administration account, and to provide the department with funds sufficient to execute and carry on such projects and activities. The legislature is further

authorized to issue bonds to the extent required to yield the amount of any sums so appropriated for the payment of which, if issued for revenue-producing improvements, the department shall provide, as set forth in section 213(d).

To enable the construction of irrigation projects which will service Hawaiian home lands, either exclusively or in conjunction with other lands served by such projects, the department is authorized, with the approval of the governor, to grant to the [board of land and natural resources], or to any other agency of the government of the State or the United States undertaking the construction and operation of such irrigation projects, licenses for rights-of-way for pipelines, tunnels, ditches, flumes, and other water conveying facilities, reservoirs and other storage facilities, and for the development and use of water appurtenant to Hawaiian home lands; to exchange available lands for public lands, as provided in section 204 (4) of this title, for sites for reservoirs and subsurface water development wells and shafts; to request any such irrigation agency to organize irrigation projects for Hawaiian home lands and to transfer irrigation facilities constructed by the department to any such irrigation agency; to agree to pay the tolls and assessments made against community pastures for irrigation water supplied to such pastures; and to agree to pay the costs of construction of projects constructed for Hawaiian home lands at the request of the department, in the event the assessments paid by the homesteaders upon lands are not sufficient to pay such costs: Provided, that licenses for rights-of-way for the purposes and in the manner specified in this section may be granted for a term of years longer than is required for amortization of the costs of the project or projects requiring use of such rights-of-way only if authority for such longer grant is approved by an act of the legislature of the State. Such payments shall be made from, and be a charge against the Hawaiian home-operating fund. [Am Jul. 10, 1937, c 482, 50 Stat 507; Nov. 26, 1941, c 544, §6, 55 Stat 786; Jun. 14, 1948, c 464, §7, 62 Stat 393; Aug. 1, 1956, c 855, §1, 70 Stat 915; am L 1963, c 207, §§2, 5(a)]

Revision Note

"Board of land and natural resources" substituted for "Hawaii Irrigation Authority". L 1961, c 166, §3.

Cross References

Bond issues, see §55 Organic Act and HRS cc 39, 47, and 49.
Irrigation projects, see §§174-13, 14.

Attorney General Opinions

Lien on lands as security for improvement bonds is not authorized. Att. Gen. Op. 63-25.

§221. [Water.] (a) When used in this section:

(1) The term "water license" means any license issued by the board of land and natural resources granting to any person the right to the use of government-owned water; and

(2) The term "surplus water" means so much of any government-owned water covered by a water license or so much of any privately owned water as is in excess of the quantity required for the use of the licensee or owner, respectively.

(b) All water licenses issued after the passage of this Act shall be deemed subject to the condition, whether or not stipulated in the license, that the licensee shall, upon the demand of the department, grant to it the right to use, free of all charge, any water which the department deems necessary adequately to supply the livestock or the domestic needs of individuals upon any tract.

(c) In order adequately to supply livestock or the domestic needs of individuals upon any tract, the department is authorized (1) to use, free of all charge, government-owned water not covered by any water license or covered by a water license issued after the passage of this Act or covered by a water license issued previous to the passage of this Act but containing a reservation of such water for the benefit of the public, and (2) to contract with any person for the right to use or to acquire, under eminent domain proceedings similar, as near as may be, to the proceedings provided in respect to land by sections 667 to 678, inclusive, of the Revised Laws of Hawaii 1915 [HRS §§101-10 to 101-34] the right to use any privately owned surplus water or any government-owned surplus water covered by a water license issued previous to the passage of this Act, but not containing a reservation of such water for the benefit of the public. Any such requirement shall be held to be for a public use and purpose. The department may institute the eminent domain proceedings in its own name.

(d) The department is authorized, for the additional purpose of adequately irrigating any tract, to use, free of all charge, government-owned surplus water tributary to the Waimea river upon the island of Kauai, not covered by a water license or covered by a water license issued after July 9, 1921. Any water license issued after that date and covering any such government-owned water shall be deemed subject to the condition, whether or not stipulated therein, that the licensee shall, upon the demand of the department, grant to it the right to use, free of all charge, any of the surplus water tributary to the Waimea river upon the island of Kauai, which is covered by the license and which the department deems necessary for the additional purpose of adequately irrigating any tract.

Any funds which may be appropriated by Congress as a grant-in-aid for the construction of an irrigation and water utilization system on the island of Molokai designed to serve Hawaiian home lands, and which are not required to be reimbursed to the federal government, shall be deemed to be payment in advance by the department and lessees of the department of charges to be made to them for the construction of such system and shall be credited against such charges when made.

(e) All rights conferred on the department by this section to use, contract for, acquire the use of water shall be deemed to include the right to use, contract for, or acquire the use of any ditch or pipeline constructed for the distribution and control of such water and necessary to such use by the department. [Am Aug. 1, 1956, c 855, §§2, 3, 70 Stat 915; am L 1963, c 207, §§2, 5(b)]

Cross References

Board of land and natural resources empowered to prepare irrigation plans, see §§174-5 and 174-6.

§222. Administration. (a) The department shall adopt rules and regulations and policies in accordance with the provisions of chapter 91, Hawaii Revised Statutes. The department may make such expenditures as are necessary for the efficient execution of the functions vested in the department by this Act. All expenditures of the department, as herein provided out of the Hawaiian home-administration account, the Hawaiian home-development fund, or the Hawaiian home-operating fund, and all monies necessary for loans made by the department, in accordance with the provisions of this Act, from the Hawaiian home-loan fund, shall be allowed and paid upon the presentation of itemized vouchers therefor,

approved by the chairman of the commission. The department shall make an annual report to the legislature of the State upon the first day of each regular session thereof and such special reports as the legislature may from time to time require. The chairman of the commission shall give bond in the sum of $25,000 for the faithful performance of his duties. The sureties upon the bond and the conditions thereof shall be approved annually by the governor.

(b) When land originally leased by the department is, in turn, subleased by the department's lessee or sublessee, the department shall submit, within ten days of the convening of any regular session, a written report to the legislature which shall cover the sublease transactions occurring in the calendar year prior to the regular session and shall contain the names of the persons involved in the transaction, the size of the area under lease, the purpose of the lease, the land classification of the area under lease, the tax map key number, the lease rental, the reason for approval of the sublease by the department, and the estimated net economic result accruing to the department, lessee and sublessee. [Am Nov. 26, 1941, c 544, §7, 55 Stat 787; Jun. 14, 1948, c 464, §8, 62 Stat 394; am L 1963, c 207, §4; am L 1972, c 173, §1]

§223. [Right of amendment, etc.] The Congress of the United States reserves the right to alter, amend, or repeal the provisions of this title.

Cross References

Amendment. see Const. Art. XI.

§224. Sanitation and reclamation expert. The Secretary of the Interior shall designate from his Department someone experienced in sanitation, rehabilitation, and reclamation work to reside in the State and cooperate with the department in carrying out its duties. The salary of such official so designated by the Secretary of the Interior shall be paid by the department while he is carrying on his duties in the State. [Add Jul. 26, 1935, c 420, §2, 49 Stat 505; am imp L 1963, c 207, §5(a); am L 1976, c 120, §1]

§225. [Investment of funds; disposition.] The department shall have the power and authority to invest and reinvest any of the moneys in any of its funds, not otherwise immediately needed for the purposes of the funds, in such bonds and securities as authorized by state law for the investment of state sinking fund moneys. Any interest or other earnings arising out of such investment shall be credited to and deposited in the Hawaiian home-operating fund and shall be considered a deposit therein from the other sources mentioned in section 213(d). [Add Nov. 26, 1941, c 544, §8, 55 Stat 787; Jun. 14, 1948, c 464, §9, 62 Stat 394; am L 1963, c 207, §5(a); am L 1965, c 30, §1]

TITLE 3: AMENDMENTS TO HAWAIIAN ORGANIC ACT.

[See the Organic Act.]

TITLE 4: MISCELLANEOUS PROVISIONS.

§401. All Acts or parts of Acts, either of the Congress of the United States or of the State of Hawaii, to the extent that they are inconsistent with the provisions of this Act, are hereby repealed.

§402. If any provision of this Act, or the application of such provision to certain circumstances, is held unconstitutional, the remainder of the Act and the application of such provision to circumstances other than those as to which it is held unconstitutional shall not be held invalidated thereby.

PROTECTION OF INDIANS AND CONSERVATION OF RESOURCES

CROSS REFERENCES:

Consolidation of Indian lands, 25 USCS §§ 2201 et seq.

§ 461. Allotment of land on Indian reservations

Hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.
(June 18, 1934, ch 576, § 1, 48 Stat. 984.)

§ 462. Existing periods of trust and restrictions on alienation extended

The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.
(June 18, 1934, ch 576, § 2, 48 Stat. 984.)

§ 462a. [Omitted]

HISTORY; ANCILLARY LAWS AND DIRECTIVES

This section (Act Apr. 11, 1940, ch 80, 54 Stat. 106) has been omitted as executed. The section provided for the reimposition and extension of trust period on lands of Crow Reservation.

§ 463. Restoration of lands to tribal ownership; protection of existing rights; Papago Indian Reservation

(a) The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: Provided, however, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: Provided further, That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation.

(b) (1) [Repealed]

(2) [Repealed]

(3) Water reservoirs, charcos, water holes, springs, wells, or any other form of water development by the United States or the Papago Indians shall not be used for mining purposes under the terms of this Act, except under permit from the Secretary of the Interior approved by the Papago Indian Council: Provided, That nothing herein shall be construed as interfering with or affecting the validity of the water rights of the Indians of this reservation: Provided further, That the appropriation of living water heretofore or hereafter affected by the Papago Indians is hereby recognized and validated subject to all the laws applicable thereto.

(4) Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes.

(June 18, 1934, ch 576, § 3, 48 Stat. 984; Aug. 28, 1937, ch 866, 50 Stat. 862; May 27, 1955, ch 106, § 1 in part, 69 Stat. 67.)

§ 463a. Extension of boundaries of Papago Indian Reservation

Whenever all privately owned lands except mining claims within the following-described area have been purchased and acquired as hereinafter authorized, the boundary of the Papago Indian Reservation in Arizona shall be extended to include the west half of section 4; west half of section 9, township 17 south, range 8 east; all of township 18 south, range 2 west, all of fractional township 19 south, range 2 west; and all of fractional townships 18 and 19 south, range 3 west, except sections 6, 7, 18, 19, 30, and 31 in township 18 south, range 3 west, Gila and Salt River meridian. This extension shall not affect any valid rights initiated prior to the approval hereof nor the reservation of a strip of land sixty feet wide along the United States-Mexico boundary made by proclamation of the President dated May 27, 1907 (35 Stat. 2136). The lands herein described when added to the Papago Indian Reservation as provided in this Act [25 USCS §§ 463a–463c] shall become a part of said reservation in all respects and upon all the same terms as if said lands had been included in the Executive order issued by the President on February 1, 1917: Provided, That lands acquired hereunder shall remain tribal lands and shall not be subject to allotment to individual Indians.

(July 28, 1937, ch 527, § 1, 50 Stat. 536.)

§ 463b. Purchase of private lands; limitations

The Secretary of the Interior be, and he is hereby, authorized to purchase for the use and benefit of the Papago Indians with any available funds heretofore or hereafter appropriated, pursuant to authority contained in section 5 of the Act of June 18, 1934 (48 Stat. 984 [25 USCS § 465]), all privately owned lands, water rights, and reservoir site reserves within townships 18 and 19 south, ranges 2 and 3 west, together with all grazing privileges and including improvements upon public lands appurtenant to the so-called Menager Dam property, at the appraised value of $40,016.37.

(July 28, 1937, ch 527, § 2, 50 Stat. 536.)

CROSS REFERENCES

This section is referred to in 25 USCS § 463a.

§ 463c. Gifts of lands by Arizona

The State of Arizona may relinquish in favor of the Papago Indians such tracts within the townships referred to in section 1 of this Act [25 USCS § 463a] as it may see fit and shall have the right to select other unreserved and nonmineral public lands within the State of Arizona equal in area to those relinquished, said lieu selections to be made in the same manner as is provided for in the Enabling Act of June 20, 1910 (36 Stat. 558), or in the discretion of the State of Arizona under the provisions of section 8 of the Act of June 28, 1934 (48 Stat. 1269), as amended and supplemented by the Act of June 26, 1936 (49 Stat. 842). The payment of fees or commissions is hereby waived in all lieu selections made pursuant to this section.
(July 28, 1937, ch 527, § 3, 50 Stat. 536.)

§ 463d. Restoration of lands in Umatilla Indian Reservation to tribal ownership

The Secretary of the Interior is hereby authorized in his discretion to restore to tribal ownership the undisposed of surplus lands of the Umatilla Indian Reservation, Oregon, heretofore opened to entry or other form of disposal under the public-land laws: Provided, That restoration shall be subject to any existing valid rights.
(Aug. 10, 1939, ch 662, § 1, 53 Stat. 1351.)

§ 463e. Exchanges of land

For the purpose of effecting land consolidations between Indians and non-Indians within the reservation, the Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to acquire through purchase, exchange, or relinquishment, any interest in lands, water rights, or surface rights to lands within said reservation. Exchanges of lands hereunder shall be made on the basis of equal value and the value of improvements on lands to be relinquished to the Indians or by Indians to non-Indians shall be given due consideration and allowance made therefor in the valuation of lieu lands. This section shall apply to tribal, trust, or otherwise restricted Indian allotments whether the allottee be living or deceased.
(Aug. 10, 1939, ch 662, § 2, 53 Stat. 1351.)

CROSS REFERENCES

This section is referred to in 25 USCS §§ 463f, 463g.

§ 463f. Title to lands

Title to lands or any interest therein acquired pursuant to this Act [25 USCS §§ 463d et seq.] for Indian use shall be taken in the name of the United States of America in trust for the tribe or individual Indian for which acquired.

(Aug. 10, 1939, ch 662, § 3, 53 Stat. 1351.)

§ 463g. Use of funds appropriated under 25 USCS § 465

For the purpose of carrying into effect the land-purchase provision of this Act [25 USCS §§ 463d et seq.], the Secretary of the Interior is hereby authorized to use so much as may be necessary of any funds heretofore or hereafter appropriated pursuant to section 5 of the Act of June 18, 1934 (48 Stat. 984) [25 USCS § 465].

(Aug. 10, 1939, ch 662, § 4, 53 Stat. 1351.)

§ 464. Transfer of restricted Indian lands or shares in assets of Indian tribes or corporation; exchange of lands

Except as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: Provided, however, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject-matter of the corporation is located, to any member of such tribe or of such corporation or any heirs or lineal descendants of such member or any other Indian person for whom the Secretary of the Interior determines that the United States may hold land in trust: Provided further, That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

(June 18, 1934, ch 576, § 4, 48 Stat. 985; Sept. 26, 1980, P. L. 96-363, § 1, 94 Stat. 1207.)

§ 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H. R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes, and the bills (S. 2531 and H. R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

(June 18, 1934, ch 576, § 5, 48 Stat. 985.)

§ 465a. Receipt and purchase in trust by United States of land for Klamath Tribe Indians

The Secretary of the Interior is hereby authorized to receive on behalf of the United States from individual members of the Klamath Tribe of Indians voluntarily executed deeds to such lands as said Indians may own in fee simple free from all encumbrances, said lands to be held in trust by the United States for said Indians and their heirs; and, whenever restricted funds are used for the purchase of lands for individual members of the Klamath Tribe of Indians, the Secretary of the Interior is authorized, in his discretion, to take title to said lands in the United States, the same to be held in trust for said individual Indians: Provided, however, That while any of the foregoing lands are held in trust by the United States for said Indians, the same shall be subject to the same restrictions, immunities, and exemptions as homesteads purchased out of trust or restricted funds of individual Indians pursuant to section 2 of the Act of June 20, 1936 (ch. 622, 49 Stat. 1542), as amended by the Act of May 19, 1937 (ch. 227, 50 Stat. 188, sec. 2) [25 USCS § 412a], except the restrictions, immunities, or exemptions of the second proviso of said Act as so amended [25 USCS § 412a].

(Feb. 24, 1942, ch 113, § 1, 56 Stat. 121.)

§ 465b. Definition of Klamath Tribe Band

As used in this Act [25 USCS § 465a and this section] the term "Klamath Tribe of Indians" includes the Klamath and Modoc Tribes, and the Yahooskin Band of Snake Indians.
(Feb. 24, 1942, ch 113, § 2, 56 Stat. 121.)

§ 466. Indian forestry units; rules and regulations

The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.
(June 18, 1934, ch 576. § 6, 48 Stat. 986.)

§ 467. New Indian reservations

The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: Provided, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.
(June 18, 1934, ch 576, § 7, 48 Stat. 986.)

§ 468. Allotments or holdings outside of reservations

Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.
(June 18, 1934, ch 576, § 8, 48 Stat. 986.)

§ 469. Indian corporations; appropriation for organizing

There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.
(June 18, 1934, ch 576, § 9, 48 Stat. 986.)

§ 470. Revolving fund; appropriation for loans

There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $20,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established.

(June 18, 1934, ch 576, § 10, 48 Stat. 986; June 29, 1960, P. L. 86-533, § 1(16), 74 Stat. 248; Sept. 15, 1961, P. L. 87-250, 75 Stat. 520.)

§ 470a. Interest charges covered into revolving fund

Interest or other charges heretofore or hereafter collected on loans shall be credited to the revolving fund created by section 470 of this title [25 USCS § 470] and shall be available for the establishment of a revolving fund for the purpose of making and administering loans to Indian-chartered corporations in accordance with sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title [25 USCS §§ 461, 462, 463, 464, 465, 466–470, 471–473, 474, 475, 476–478, 479], and of making and administering loans to individual Indians and to associations or corporate groups of Indians of Oklahoma in accordance with subchapter VIII of this chapter [25 USCS §§ 501 et seq.].

(June 28, 1941, ch 259, § 1, 55 Stat. 316.)

§ 471. Vocational and trade schools; appropriation for tuition

There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: Provided, That not more than $50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

(June 18, 1934, ch 576, § 11, 48 Stat. 986.)

§ 472. Standards for Indians appointed to Indian Office

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, [without regard to civil-service laws,] to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

(June 18, 1934, ch 576, § 12, 48 Stat. 986.)

§ 472a. Indian preference laws applicable to Bureau of Indian Affairs and Indian Health Service positions

(a) Establishment of retention categories for purposes of reduction-in-force procedures. For purposes of applying reduction-in-force procedures under subsection (a) of section 3502 of title 5, United States Code [5 USCS § 3502(a)], with respect to positions within the Bureau of Indian Affairs and the Indian Health Service, the competitive and excepted service retention registers shall be combined, and any employee entitled to Indian preference who is within a retention category established under regulations prescribed under such subsection to provide due effect to military preference shall be entitled to be retained in preference to other employees not entitled to Indian preference who are within such retention category.

(b) Reassignment of employees other than to positions in higher grades; authority to make determinations respecting. (1) The Indian preference laws shall not apply in the case of any reassignment within the Bureau of Indian Affairs or within the Indian Health Service (other than to a position in a higher grade) of an employee not entitled to Indian preference if it is determined that under the circumstances such reassignment is necessary—

(A) to assure the health or safety of the employee or of any member of the employee's household;

(B) in the course of a reduction in force; or

(C) because the employee's working relationship with a tribe has so deteriorated that the employee cannot provide effective service for such tribe or the Federal Government.

(2) The authority to make any determination under subparagraph (A), (B), or (C) of paragraph (1) is vested in the Secretary of the Interior with respect to the Bureau of Indian Affairs and the Secretary of Health, Education, and Welfare [Secretary of Health and Human Services] with respect to the Indian Health Service, and, notwithstanding any other provision of law, the Secretary involved may not delegate such authority to any individual other than an Under Secretary or Assistant Secretary of the respective department.

(c) **Waiver of applicability in personnel actions; scope, procedures, etc.** (1) Notwithstanding any provision of the Indian preference laws, such laws shall not apply in the case of any personnel action respecting an employee not entitled to Indian preference if each tribal organization concerned grants, in writing, a waiver of the application of such laws with respect to such personnel action.

(2) The provisions of section 8336(j) of title 5, United States Code [5 USCS § 8336(j)] (as added by the preceding section of this Act), shall not apply to any individual who has accepted a waiver with respect to a personnel action pursuant to paragraph (1) of this subsection or to section 1131(f) of the Education Amendments of 1978 (25 U.S.C. 2011(f); 92 Stat. 2324) [25 USCS § 2011(f)].

(d) **Annual report respecting Indians qualifying for preference positions.** The Secretaries of the Interior and Health, Education, and Welfare [Health and Human Services] shall each submit to the Congress a report following the close of each fiscal year with respect to the actions which they took in such fiscal year to recruit and train Indians to qualify such Indians for positions which are subject to preference under the Indian preference laws. Such report shall also include information as to the grade levels and occupational classifications of Indian and non-Indian employees in the Bureau of Indian Affairs and the Indian Health Service.

(e) **Placement of non-Indian employees in other Federal positions; assistance of Office of Personnel Management; Cooperation of other Federal agencies; reporting requirements.** (1) The Office of Personnel Management shall provide all appropriate assistance to the Bureau of Indian Affairs and the Indian Health Service in placing non-Indian employees of such agencies in other Federal positions. All other Federal agencies shall cooperate to the fullest extent possible in such placement efforts.

(2) The Secretaries of the Interior and Health, Education, and Welfare [Health and Human Services], and the Director of the Office of Personnel Management shall each submit a report to Congress following the close of each fiscal year with respect to the actions which they took in such fiscal year to place non-Indian employees of the Bureau of Indian Affairs and the Indian Health Service in other Federal positions.

(f) **Definitions.** For purposes of this section—

(1) The term "tribal organization" means—

(A) the recognized governing body of any Indian tribe, band, nation, pueblo, or other organized community, including a Native village (as defined in section 3(c) of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(c); 85 Stat. 688)) [43 USCS § 1602(c)]; or

(B) in connection with any personnel action referred to in subsection (c)(1) of this section, any legally established organization of Indians which is controlled, sanctioned, or chartered by a governing body referred to in subparagraph (A) of this paragraph and which has been delegated by such governing body the authority to grant a waiver under such subsection with respect to such personnel action.

(2) The term "Indian preference laws" means section 12 of the Act of June 18, 1934 (25 U.S.C. 472; 48 Stat. 986) [25 USCS § 472] or any other provision of law granting a preference to Indians in promotions and other personnel actions.

(3) The term "Bureau of Indian Affairs" means (A) the Bureau of Indian Affairs and (B) all other organizational units in the Department of the Interior directly and primarily related to providing services to Indians and in which positions are filled in accordance with the Indian preference laws.

§ 473. Application of sections

The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16 [25 USCS §§ 469, 470, 471, 472, 476], shall apply to the Territory [State] of Alaska: Provided, That sections 2, 4, 7, 16, 17, and 18 of this Act [25 USCS §§ 462, 464, 467, 476, 477, 478] shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawanee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Section 4 of this Act [25 USCS § 464] shall not apply to the Indians of the Klamath Reservation in Oregon.

(June 18, 1934, ch 576, § 13, 48 Stat. 986.)

§ 473a. Application to Alaska

Sections 1, 5, 7, 8, 15, 17, and 19 of the Act entitled "An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes," approved June 18, 1934 (48 Stat. 984) [25 USCS §§ 461, 465, 467, 468, 475, 477, 479], shall hereafter apply to the Territory [State] of Alaska: Provided, That groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 16, 17, and 10 of the Act of June 18, 1934 (48 Stat. 984) [25 USCS §§ 476, 477, 470, respectively].

(May 1, 1936, ch 254, § 1, 49 Stat. 1250.)

§ 474. Continuance of allowances

The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (23 Stat. L. 894), or their commuted cash value under the Act of June 10, 1896 (29 Stat. L. 334), to all Sioux Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of the Act of May 29, 1908 (25 Stat. L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and carried on the books of the Treasury for this purpose. No person shall receive in his own right more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse. Such benefits shall continue to be paid upon such reservation until such time as the lands available therein for allotment at the time of the passage of this Act [enacted June 18, 1934] would have been exhausted by the award to each person receiving such benefits of an allotment of eighty acres of such land.

(June 18, 1934, ch 576, § 14, 48 Stat. 987.)

§ 475. Claims or suits of Indian tribes against United States; rights unimpaired

Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. It is hereby declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by this Act shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States.

(June 18, 1934, ch 576, § 15, 48 Stat. 987.)

§ 475a. Offsets of gratuities

In all suits now pending in the Claims Court by an Indian tribe or band which have not been tried or submitted, and in any suit hereafter filed in the Claims Court by any such tribe or band, the Claims Court is hereby directed to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band; and in all cases now pending or hereafter filed in the Claims Court in which an Indian tribe or band is party plaintiff, wherein the duty of the court is merely to report its findings of fact and conclusions to Congress, the said Claims Court is hereby directed to include in its report a statement of the amount of money which has been expended by the United States gratuitously for the benefit of the said tribe or band: Provided, That expenditures made prior to the date of the law, treaty, agreement, or Executive order under which the claims arise shall not be offset against the claims or claim asserted; and expenditures under the Act of June 18, 1934 (48 Stat. L. 984), except expenditures under appropriations made pursuant to section 5 of such Act [25 USCS § 465], shall not be charged as offsets against any claim on behalf of an Indian tribe or tribes now pending in the Claims Court or hereafter filed: Provided further, That funds appropriated and expended from tribal funds shall not be construed as gratuities; and this section shall not be deemed to amend or affect the various Acts granting jurisdiction to the Claims Court to hear and determine the claims listed on page 678 of the hearings before the subcommittee of the House Committee on Appropriations on the second deficiency appropriation bill for the fiscal year 1935: And provided further, That no expenditure under any emergency appropriation or allotment made subsequently to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public works and public projects for the relief of unemployment or to increase employment, and for work relief (including the civil-works program) shall be considered in connection with the operation of this section.

(Aug. 12, 1935, ch 508, § 2, 49 Stat. 596; Apr. 2, 1982, P. L. 97-164, Title I, § 160(a)(8), 96 Stat. 48.)

§ 476. Organization of Indian tribes; constitution and by-laws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and by-laws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and by-laws may be ratified and approved by the Secretary in the same manner as the original constitution and by-laws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget [Office of Management and Budget] and the Congress.

(June 18, 1934, ch 576, § 16, 48 Stat. 987.)

§ 477. Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: Provided, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

(June 18, 1934, ch 576, § 17, 48 Stat. 988.)

§ 478. Acceptance of 25 USCS §§ 461–479 optional

This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

(June 18, 1934, ch 576, § 18, 48 Stat. 988.)

§ 478a. Procedure

In any election heretofore or hereafter held under the Act of June 18, 1934 (48 Stat. 984), on the question of excluding a reservation from the application of the said Act or on the question of adopting a constitution and bylaws or amendments thereto or on the question of ratifying a charter, the vote of a majority of those actually voting shall be necessary and sufficient to effectuate such exclusion, adoption, or ratification, as the case may be: Provided, however, That in each instance the total vote cast shall not be less than 30 per centum of those entitled to vote.
(June 15, 1935, ch 260, § 1, 49 Stat. 378.)

§ 478b. Application of laws and treaties

All laws, general and special, and all treaty provisions affecting any Indian reservation which has voted or may vote to exclude itself from the application of the Act of June 18, 1934 (48 Stat. 984), shall be deemed to have been continuously effective as to such reservation, notwithstanding the passage of said Act of June 18, 1934. Nothing in the Act of June 18, 1934, shall be construed to abrogate or impair any rights guaranteed under any existing treaty with any Indian tribe, where such tribe voted not to exclude itself from the application of said Act.
(June 15, 1935, ch 260, § 4, 49 Stat. 378.)

§ 479. Definitions

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.
(June 18, 1934, ch 576, § 19, 48 Stat. 988.)

Sec.
83.7 Form and content of petition.
83.8 Notice of receipt of petition.
83.9 Processing the petition.
83.10 Reconsideration and final action.
83.11 Implementation of decisions.

AUTHORITY: 5 U.S.C. 301; secs. 463 and 465 of the Revised Statutes. 25 U.S.C. 2 and 9; and 230 DM 1 and 2.

SOURCE: 43 FR 39361, Sept. 5, 1978, unless otherwise noted. Redesignated at 47 FR 13327, Mar. 30, 1982.

§ 83.1 Definitions.

(a) "Secretary" means the Secretary of the Interior or his authorized representative.

(b) "Assistant Secretary" means the Assistant Secretary—Indian Affairs, or his authorized representative.

(c) "Department" means the Department of the Interior.

(d) "Bureau" means the Bureau of Indian Affairs.

(e) "Area Office" means the Bureau of Indian Affairs Area Office.

(f) "Indian tribe," also referred to herein as "tribe," means any Indian group within the continental United States that the Secretary of Interior acknowledges to be an Indian tribe.

(g) "Indian group" or "group" means any Indian aggregation within the continental United States that the Secretary of the Interior does not acknowledge to be an Indian tribe.

(h) "Petitioner" means any entity which has submitted a petition to the Secretary requesting acknowledgement that it is an Indian tribe.

(i) "Autonomous" means having a separate tribal council, internal process, or other organizational mechanism which the tribe has used as its own means of making tribal decisions independent of the control of any other Indian governing entity. Autonomous must be understood in the context of the Indian culture and social organization of that tribe.

(j) "Member of an Indian group" means an individual who is recognized by an Indian group as meeting its membership criteria and who consents to being listed as a member of that group.

(k) "Member of an Indian tribe" means an individual who meets the membership requirements of the tribe as set forth in its governing document or is recognized collectively by those persons comprising the tribal governing body, and has continuously maintained tribal relations with the tribe or is listed on the tribal rolls of that tribe as a member, if such rolls are kept.

(l) "Historically", "historical" or "history" means dating back to the earliest documented contact between the aboriginal tribe from which the petitioners descended and citizens or officials of the United States, colonial or territorial governments, or if relevant, citizens and officials of foreign governments from which the United States acquired territory.

(m) "Continuously" means extending from generation to generation throughout the tribe's history essentially without interruption.

(n) "Indigenous" means native to the continental United States in that at least part of the tribe's aboriginal range extended into what is now the continental United States.

(o) "Community" or "specific area" means any people living within such a reasonable proximity as to allow group interaction and a maintenance of tribal relations.

(p) "Other party" means any person or organization, other than the petitioner who submits comments or evidence in support of or in opposition to a petition.

§ 83.2 Purpose.

The purpose of this part is to establish a departmental procedure and policy for acknowledging that certain American Indian tribes exist. Such acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes. Such acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their status as Indian tribes as well as the responsibilities and obligations of such tribes. Acknowledgment shall subject the Indian tribe to the same authority of Congress and the United States to which other federally acknowledged tribes are subjected.

§ 83.3 Scope.

(a) This part is intended to cover only those American Indian groups indigenous to the continental United States which are ethnically and culturally identifiable, but which are not currently acknowledged as Indian tribes by the Department. It is intended to apply to groups which can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present.

(b) This part does not apply to Indian tribes, organized bands, pueblos or communities which are already acknowledged as such and are receiving services from the Bureau of Indian Affairs.

(c) This part is not intended to apply to associations, organizations, corporations or groups of any character, formed in recent times; provided that a group which meets the criteria in § 83.7(a)-(g) has recently incorporated or otherwise formalized its existing autonomous process will have no bearing on the Assistant Secretary's final decision.

(d) Nor is this part intended to apply to splinter groups, political factions, communities or groups of any character which separate from the main body of a tribe currently acknowledged as being an Indian tribe by the Department, unless it can be clearly established that the group has functioned throughout history until the present as an autonomous Indian tribal entity.

(e) Further, this part does not apply to groups which are, or the members of which are, subject to congressional legislation terminating or forbidding the Federal relationship.

§ 83.4 Who may file.

Any Indian group in the continental United States which believes it should be acknowledged as an Indian tribe, and can satisfy the criteria in § 83.7, may submit a petition requesting that the Secretary acknowledge the group's existence as an Indian tribe.

§ 83.5 Where to file.

A petition requesting the acknowledgment that an Indian group exists as an Indian tribe shall be filed with the Assistant Secretary—Indian Affairs, Department of the Interior, 18th and "C" Streets NW., Washington, D.C. 20245. Attention: Federal acknowledgment project.

§ 83.6 Duties of the Department.

(a) The Department shall assume the responsibility to contact, within a twelve-month period following the enactment of these regulations, all Indian groups known to the Department in the continental United States whose existence has not been previously acknowledged by the Department. Included specifically shall be those listed in chapter 11 of the American Indian Policy Review Commission final report, volume one, May 17, 1977. The Department shall inform all such groups of the opportunity to petition for an acknowledgment of tribal existence by the Federal Government.

(b) The Secretary shall publish in the FEDERAL REGISTER within 90 days after effective date of these regulations, a list of all Indian tribes which are recognized and receiving services from the Bureau of Indian Affairs. Such list shall be updated and published annually in the FEDERAL REGISTER.

(c) Within 90 days after the effective date of the final regulations, the Secretary will have available suggested guidelines for the format of petitions, including general suggestions and guidelines on where and how to research for required information. The Department's example of petition format, while preferable, shall not preclude the use of any other format.

(d) The Department shall, upon request, provide suggestions and advice to researchers representing a petitioner for their research into the petitioner's historical background and Indian identity. The Department shall not be responsible for the actual research on behalf of the petitioner.

§ 83.7 Form and content of the petition.

The petition may be in any readable form which clearly indicates that it is a petition requesting the Secretary to acknowledge tribal existence. All the criteria in paragraphs (a) through (g)

of this section are mandatory in order for tribal existence to be acknowledged and must be included in the petition.

(a) A statement of facts establishing that the petitioner has been identified from historical times until the present on a substantially continuous basis, as "American Indian," or "aboriginal." A petitioner shall not fail to satisfy any criteria herein merely because of fluctuations of tribal activity during various years. Evidence to be relied upon in determining the group's substantially continuous Indian identity shall include one or more of the following:

(1) Repeated identification by Federal authorities;

(2) Longstanding relationships with State governments based on identification of the group as Indian;

(3) Repeated dealings with a county, parish, or other local government in a relationship based on the group's Indian identity;

(4) Identification as an Indian entity by records in courthouses, churches, or schools;

(5) Identification as an Indian entity by anthropologists, historians, or other scholars;

(6) Repeated identification as an Indian entity in newspapers and books;

(7) Repeated identification and dealings as an Indian entity with recognized Indian tribes or national Indian organizations.

(b) Evidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area.

(c) A statement of facts which establishes that the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present.

(d) A copy of the group's present governing document, or in the absence of a written document, a statement describing in full the membership criteria and the procedures through which the group currently governs its affairs and its members.

(e) A list of all known current members of the group and a copy of each available former list of members based on the tribe's own defined criteria. The membership must consist of individuals who have established, using evidence acceptable to the Secretary, descendancy from a tribe which existed historically or from historical tribes which combined and functioned as a single autonomous entity. Evidence acceptable to the Secretary of tribal membership for this purpose includes but is not limited to:

(1) Descendancy rolls prepared by the Secretary for the petitioner for purposes of distributing claims money, providing allotments, or other purposes;

(2) State, Federal, or other official records or evidence identifying present members or ancestors of present members as being an Indian descendant and a member of the petitioning group;

(3) Church, school, and other similar enrollment records indicating the person as being a member of the petitioning entity;

(4) Affidavits of recognition by tribal elders, leaders, or the tribal governing body, as being an Indian descendant of the tribe and a member of the petitioning entity;

(5) Other records or evidence identifying the person as a member of the petitioning entity.

(f) The membership of the petitioning group is composed principally of persons who are not members of any other North American Indian tribe.

(g) The petitioner is not, nor are its members, the subject of congressional legislation which has expressly terminated or forbidden the Federal relationship.

§ 83.8 Notice of receipt of petition.

(a) Within 30 days after receiving a petition, the Assistant Secretary shall send an acknowledgment of receipt, in writing, to the petitioner, and shall have published in the FEDERAL REGISTER a notice of such receipt including the name and location, and mailing address of the petitioner and other such information that will identify the entity submitting the petition and the

date it was received. The notice shall also indicate where a copy of the petition may be examined.

(b) Groups with petitions on file with the Bureau on the effective date of these regulations shall be notified within 90 days from the effective date that their petition is on file. Notice of that fact, including the information required in paragraph (a) of this section, shall be published in the FEDERAL REGISTER. All petitions on file on the effective date will be returned to the petitioner with guidelines as specified in § 83.6(c) in order to give the petitioner an opportunity to review, revise, or supplement the petition. The return of the petition will not affect the priority established by the initial filing.

(c) The Assistant Secretary shall also notify, in writing, the Governor and attorney general of any State in which a petitioner resides.

(d) The Assistant Secretary shall also cause to be published the notice of receipt of the petition in a major newspaper of general circulation in the town or city nearest to the petitioner. The notice will include, in addition to the information in paragraph (a) of this section, notice of opportunity for other parties to submit factual or legal arguments in support of or in opposition to the petition. Such submissions shall be provided to the petitioner upon receipt by the Federal acknowledgement staff. The petitioner shall be provided an opportunity to respond to such submissions prior to a final determination regarding the petitioner's status.

§ 83.9 Processing the petition.

(a) Upon receipt of a petition, the Assistant Secretary shall cause a review to be conducted to determine whether the petitioner is entitled to be acknowledged as an Indian tribe. The review shall include consideration of the petition and supporting evidence, and the factual statements contained therein. The Assistant Secretary may also initiate other research by his staff, for any purpose relative to analyzing the petition and obtaining additional information about the petitioner's status, and may consider any evidence which may be submitted by other parties.

(b) Prior to actual consideration of the petition, the Assistant Secretary shall notify the petitioner of any obvious deficiencies, or significant omissions, that are apparent upon an initial review, and provide the petitioner with an opportunity to withdraw the petition for further work or to submit additional information or a clarification.

(c) Petitions shall be considered on a first come, first serve basis determined by the date of original filing with the Department. The Federal acknowledgement project staff shall establish a priority register including those petitions already pending before the Department.

(d) The petitioner and other parties submitting comments on the petition shall be notified when the petition comes under active consideration. They shall also be notified who is the primary Bureau staff member reviewing the petition, his backup, and supervisor. Such notice shall also include the office address and telephone number of the primary staff member.

(e) A petitioning group may, at its option and upon written request, withdraw its petition prior to publication by the Assistant Secretary of his finding in the FEDERAL REGISTER and, may if it so desires, file an entirely new petition. Such petitioners shall not lose their priority date by withdrawing and resubmitting their petitions later, provided the time periods in paragraph (f) of this section shall begin upon active consideration of the resubmitted petition.

(f) Within 1 year after notifying the petitioner that active consideration of the petition has begun, the Assistant Secretary shall publish his proposed findings in the FEDERAL REGISTER. The Assistant Secretary may extend that period up to an additional 180 days upon a showing of due cause to the petitioner. In addition to the proposed findings, the Assistant Secretary shall prepare a report which shall summarize the evidence for the proposed decision. Copies of such report shall be available for the petitioner and other parties upon written request.

(g) Upon publication of the proposed findings, any individual or organization wishing to challenge the proposed findings shall have a 120-day response period to present factual or legal arguments and evidence to rebut the evidence relied upon.

(h) After consideration of the written arguments and evidence rebutting the proposed findings, the Assistant Secretary shall make a determination regarding the petitioner's status, a summary of which shall be published in the FEDERAL REGISTER within 60 days from the expiration of the response period. The determination will become effective in 60 days from publication unless earlier withdrawn pursuant to § 83.10.

(i) The Assistant Secretary shall acknowledge the existence of the petitioner as an Indian tribe when it is determined that the group satisfies the criteria in § 83.7.

(j) The Assistant Secretary shall refuse to acknowledge that a petitioner is an Indian tribe if it fails to satisfy the criteria in § 83.7. In the event the Assistant Secretary refuses to acknowledge the eligibility of a petitioning group, he shall analyze and foward to the petitioner other options, if any, under which application for services and other benefits may be made.

§ 83.10 Reconsideration and final action.

(a) The Assistant Secretary's decision shall be final for the Department unless the Secretary requests him to reconsider within 60 days of such publication. If the Secretary recommends reconsideration, the Assistant Secretary shall consult with the Secretary, review his initial determination, and issue a reconsidered decision within 60 days which shall be final and effective upon publication.

(b) The Secretary in his consideration of the Assistant Secretary's decision may review any information available to him, whether formally part of the record or not; where reliance is placed on information not of record, such information shall be identified as to source and nature, and inserted in the record.

(c) The Secretary may request reconsideration of any decision by the Assistant Secretary but shall request reconsideration of any decision, which in his opinion:

(1) Would be changed by significant new evidence which he has received subsequent to the publication of the decision; or

(2) A substantial portion of the evidence relied on was unreliable or was of little probative value; or

(3) The petitioner's or the Bureau's research appears inadequate or incomplete in some material respect.

(d) Any notice which by the terms of these regulations must be published in the FEDERAL REGISTER, shall also be mailed to the petitioner, the Governors and attorney generals of the States involved, and to other parties which have commented on the proposed findings.

§ 83.11 Implementation of decisions.

(a) Upon final determination that the petitioner is an Indian tribe, the tribe shall be eligible for services and benefits from the Federal Government available to other federally recognized tribes and entitled to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes with a government-to-government relationship to the United States as well as having the responsibilities and obligations of such tribes. Acknowledgment shall subject such Indian tribes to the same authority of Congress and the United States to which other federally acknowledged tribes are subject.

(b) While the newly recognized tribe shall be eligible for benefits and services, acknowledgment of tribal existence will not create an immediate entitlement to existing Bureau of Indian Affairs programs. Such programs shall become available upon appropriation of funds by Congress. Requests for appropriations shall follow a determination of the needs of the newly recognized tribe.

(c) Within 6 months after acknowledgment that the petitioner exists as an Indian tribe, the appropriate Area Office shall consult and develop in cooperation with the group, and forward to the Assistant Secretary, a determination of needs and a recommended budget required to serve the newly ac-

knowledged tribe. The recommended budget will be considered along with other recommendations by the Assistant Secretary in the usual budget-request process.

PART 87—USE OR DISTRIBUTION OF INDIAN JUDGMENT FUNDS

Sec.

87.1 Definitions.
87.2 Purpose.
87.3 Time limits.
87.4 Conduct of hearings of record.
87.5 Submittal of proposed plan by Secretary.
87.6 Extension of period for submitting plans.
87.7 Submittal of proposed legislation by Secretary.
87.8 Enrollment aspects of plans.
87.9 Programming aspects of plans.
87.10 Per capita payment aspects of plans and protection of funds accruing to minors, legal incompetents and deceased beneficiaries.
87.11 Investment of judgment funds.
87.12 Insuring the proper performance of approved plans.

AUTHORITY: 5 U.S.C. 301; 87 Stat. 466, 467, 468.

SOURCE: 39 FR 1835, Jan. 15, 1974, unless otherwise noted. Redesignated at 47 FR 13327, Mar. 30, 1982.

§ 87.1 Definitions.

As used in this Part 87, terms shall have the meanings set forth in this section.

(a) "Act" means the Act of October 19, 1973 (Pub. L. 93-134; 87 Stat. 466, 467, 468).

(b) "Secretary" means the Secretary of the Interior or his authorized representative.

(c) "Commissioner" means the Commissioner of Indian Affairs or his authorized representative.

(d) "Area Director" means the Area Director or his equivalent of any one of the Area Offices of the Bureau of Indian Affairs or his authorized representative.

(e) "Superintendent" means the Superintendent or Officer in Charge of any one of the Agency Offices or other local offices of the Bureau of Indian Affairs or his authorized representative.

(f) "Congressional Committees" means the Committees on Interior and Insular Affairs of the Senate and House of Representatives of the United States.

(g) "Indian tribe or group" means any Indian tribe, nation, band, pueblo, community or identifiable group of Indians, or Alaska Native entity.

(h) "Tribal governing body" means, as recognized by the Secretary, the governing body of a formally organized or recognized tribe or group; the governing body of any informally organized tribe or group, the governing body of a formally organized Alaska Native entity or recognized tribe in Oklahoma, and for the purposes of the Act the recognized spokesmen or representatives of any descendant group.

(i) "Plan" means the document submitted by the Secretary, together with all pertinent records, for the use or distribution of judgment funds, to the Congressional Committees.

(j) "Enrollment" means that aspect of a plan which pertains to making or bringing current a roll of members of an organized, reservation-based tribe with membership criteria approved or accepted by the Secretary, a roll of members of an organized or recognized entity in Oklahoma, or Alaska or elsewhere, or a roll prepared for the purpose of making per capita payments for judgments awarded by the Indian Claims Commission or United States Court of Claims; or which pertains to using an historical roll or records of names, including tribal rolls closed and made final, for research or other purposes.

(k) "Program" means that aspect of a plan which pertains to using part or all of the judgment funds for tribal social and economic development projects.

(l) "Per capita payment" means that aspect of a plan which pertains to the individualization of the judgment funds in the form of shares to tribal members or to individual descendants.

(m) "Use or distribution" means any utilization or disposition of the judgment funds, including programing, per capita payments, or a combination thereof.

(n) "Individual beneficiary" means a tribal member or any individual descendant, found by the Secretary to be eligible to participate in a plan, who

NO. ____

IN THE UNITED STATES SUPREME COURT

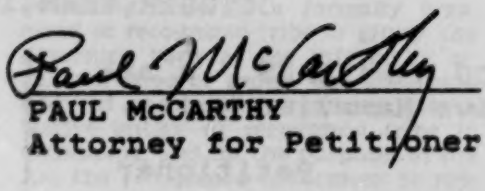
OCTOBER TERM 1984

HOU HAWAIIANS, a native Hawaiian tribe, Petitioner, vs. STATE OF HAWAII, STATE OF HAWAII DEPARTMENT OF TRANSPORTATION, a division of the State of Hawaii, STATE OF HAWAII DEPARTMENT OF BUDGET AND FINANCE, a division of the State of Hawaii, and GEORGE ARIYOSHI, in his capacity as Governor of the State of Hawaii, Defendants,	Ct. App. No. 84-2444 D.C. No. C-83-1135 HMF

CERTIFICATE OF SERVICE

I hereby certify that 3 true copies of the within was served by United States Mail to the following person on September 23, 1985.

CHARLOTTE LIBMAN, ESQ.
Deputy Attorney General
State Capitol
Honolulu, Hawaii 96813



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Supreme Court, U.S.
FILED
DEC 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-529

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HOU HAWAIIANS,

Petitioner,

v.

STATE OF HAWAII, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court below properly ruled that the Hou Hawaiians did not qualify for 28 U.S.C. § 1362 jurisdiction, after the Hous submitted extensive briefing, at the request of the court which did not establish that the Hou or their governing body have been "duly recognized" by the Secretary of the Interior for the purposes of § 1362 jurisdiction.

2. Whether the court below properly dismissed the Hous' claims against the State of Hawaii, its Department of Transportation and its Department of Budget and Finance because of the Eleventh Amendment's bar to suits against a state, absent a waiver of the State's sovereign immunity.

3. Whether the court below properly dismissed the Hous' claims against George Ariyoshi in his capacity as governor because the Hou could not claim a private cause of action under the Admission Act.

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IN THE

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OCTOBER TERM, 1985

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v.

STATE OF HAWAII, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Respondents, the State of Hawaii, the Department of Transportation, the Department of Budget and Finance, and Governor George Ariyoshi, respectfully pray that a Writ of Certiorari not issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The unanimous opinion of the Ninth Circuit Court of Appeals issued in 1985 is reported as *Price* v. *State*

of Hawaii, 764 F.2d 623. The opinion is reprinted as Appendix "4" of the Appendix to the Petition. The Orders Granting Motion to Dismiss and Denying Motion for Reconsideration of Order Granting Motion to Dismiss of the U.S. District Court for the District of Hawaii from which the appeal was taken are set forth as Appendix "1" and "2" respectively in the Appendix to the Petition.

JURISDICTION

The jurisdictional statutes relied upon by Petitioner in the First Amended Complaint are: (1) 28 U.S.C. § 1331; (2) Section 5(f) of the Admission Act; and (3) 28 U.S.C. § 1362. In the Ninth Circuit Court of Appeals, jurisdiction was based on 28 U.S.C. § 1291. No rehearing of the Ninth Circuit's decision was sought. Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 2101.

STATUTES INVOLVED

28 U.S.C. § 1362, commonly referred to as the Indian Tribal Jurisdictional Act, provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Another relevant statute involved in this case is Section 5(f) of the Hawaii Admission Act, reprinted as Appendix "5" in the Appendix to the Petition.

STATEMENT OF THE CASE

A native Hawaiian tribal body brought action against the State of Hawaii, its Departments of Transportation and Budget and Finance and Governor Ariyoshi, in his capacity as Governor, to compel the State to apply a "just and fair portion" of the proceeds of the lands described in Section 5(f) of the Admission Act to "betterment of conditions of native Hawaiians."

Specifically, Petitioner requested the following relief:

(1) An accounting of all section 5(f) funds;

(2) A "just and fair portion of future revenues" from 5(f) lands, not less than 20% of such future revenues, which funds are to be administered by the Department of Hawaiian Home Lands (not a party to this action); the Office of Hawaiian Affairs (not a party to this action); themselves; and monitored by the United States Department of the Interior (not a party to this action);

(3) Damages against the Respondents "for past neglect in failing to properly administer the funds"; and

(4) The use of the award to secure matching federal funds to implement the Hawaiian Homes Commission Act.

Petitioner predicated its claim upon section 5(f) of the Admission Act and alleged that they were the "legal equivalent to a Federally recognized Indian tribe" within the meaning of 28 U.S.C. § 1362. Petitioner argued that since the text of section 5(f) authorizes the United States to bring suit against the State, pursuant to the "co-plaintiff" doctrine recog-

nized in *Moe* v. *Confederated Salish and Kootenai Tribes,* 425 U.S. 463, 43 L.Ed.2d 96 (1976), they were entitled to sue to protect the "tribe's" rights.

The District Court granted the State's motion to dismiss on the ground that the decision in *Keaukaha-Panaewa Community Association* v. *Hawaiian Homes Commission,* 588 F.2d 1216 (9th Cir. 1978), *cert. denied,* 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979) (*"Keaukaha I"*) compelled a finding that the District Court lacked subject matter jurisdiction over the Hous' suit, since Petitioner could not claim a private cause of action under the Admission Act.

In denying Petitioner's Motion for Reconsideration, the District Court pointed out that the "co-plaintiff" doctrine was not available to Petitioner because the United States is not a trustee of the section 5(f) ceded land trust and § 1362 did not operate to confer a federal cause of action in this case.

Subsequent to oral argument in the Ninth Circuit, the Court requested supplemental memoranda addressing the following issues:

(1) Are the Hou Hawaiians an Indian tribe or band with a governing body *duly recognized by the Secretary of the Interior*?

In regard to this question the Court pointed out that 28 U.S.C. §1362 does not grant jurisdiction to "legal equivalents." The Court also noted that the Hou Hawaiians are not listed by the Bureau of Indian Affairs as a tribe officially eligible to receive benefits.

(2) On what basis can this court imply a private cause of action for the Hou Hawaiians to enforce the Admission Act, when *Keaukaha-*

> *Panaewa Community Assoc.* v. *Hawaiian Homes Commission,* 588 F.2d 1216 (9th Cir. 1978), *cert. denied,* 444 U.S. 826 (1979), holds that Congress did not intend individual native Hawaiians to have a private cause of action?

In response to the Ninth Circuit's request, Petitioner submitted voluminous amounts of material for the Court's consideration, in response to the first question.

In *Price* v. *State of Hawaii, supra,* the decision reflects that the Court considered all the documents and material submitted by Petitioner and the relevant statutes governing the organization and recognition of Indian tribes and concluded that neither the Hou nor their governing body have been "duly recognized" by the Secretary of Interior. Thus, the Hou did not qualify for § 1362 jurisdiction, even if the Court assumes that they are an "Indian tribe or band."

In this Petition, the Hou seeks another "bite at the apple" in an attempt to demonstrate that they qualify for § 1362 jurisdiction, having been given every opportunity to do so, and having failed to support their contention.

REASONS FOR GRANTING THE WRIT

I. The Issues Raised By The Petition Are So Unusual That They Are Unlikely To Recur.

In support of its reasons why Certiorari should be granted, Petitioner complains that they have not been given a reasonable opportunity to prove its qualifications under 28 U.S.C. § 1362. (Petition at 21).

Even a cursory examination of the Ninth Circuit's decision negates such an argument. The Ninth Circuit

spent an exorbitant amount of time reviewing Petitioner's Opening Brief and extensive supplemental briefing submitted by Petitioner before resolving the question of whether the Hou qualify for § 1362 jurisdiction.

Since the Hous could not establish that they qualified for § 1362 jurisdiction the first time around, there seems to be little utility in this Court remanding the case to the District Court for an "evidentiary hearing," as suggested by Petitioner, in order to rehash the same arguments.

Petitioner has been afforded a full and fair opportunity to support its arguments at the Appellate Court level.

After laboring at length with a voluminous record, the Ninth Circuit Court of Appeals issued a comprehensive decision, concluding that the Hou failed to demonstrate eligibility for recognition, thus not qualifying for § 1362 jurisdiction, which opinion is well supported by logic, case law, and legal authority.

Given the thoroughness of the Ninth Circuit's analysis of the question of whether the Hou qualify for § 1362 jurisdiction, a further review of the issue presented by the Petition is unwarranted.

Additionally, it appears that the question of whether a native Hawaiian tribe is an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior" is hardly likely to recur.

In the State of Hawaii there are numerous nonprofit and profit organizations, community groups,

associations, civic clubs, and a government agency, the Office of Hawaiian Affairs, devoted to the betterment of conditions of native Hawaiians.

None of the organizations has ever asserted or indicated that it is an "Indian tribe or band" or that its members are Indians. It is hardly likely that they ever will.

When native Hawaiians or native Hawaiian organizations litigate in both State and Federal Courts, they do so as "native Hawaiians."

Petitioner's further argument that the "combined effect of the lower court's decisions has been to lock Petitioner out of Federal Court" (Petition at 21, 32) is totally lacking in merit.

Both State and Federal Courts have entertained lawsuits instigated by native Hawaiians or native Hawaiian community associations relating to the State's trust obligations to native Hawaiians. See i.e. *Keaukaha-Panaewa Community Association* v. *Hawaiian Homes Commission,* 739 F.2d 1467 (9th Cir. 1984) (*"Keaukaha II"*); *Ahuna* v. *Department of Hawaiian Home Lands,* 64 Haw. 327, 640 P.2d 1161 (1982).

Furthermore, the Ninth Circuit's decision clearly indicates that the Hou have standing in Federal Court, in an appropriate case, with proper parties, proper issues to be resolved, and proper relief requested.

Obviously, this is not such a case.

The issue presented in this Petition relates to this case alone and is unlikely to be repeated. The writ requested should be denied.

II. The Decision By The Ninth Circuit Is In Accord With The Decision Of Every Court Which Has Addressed The Jurisdictional Reach Of Section 1362.

The District Court held that the "co-plaintiff doctrine" was not available to the Hou. The Ninth Circuit Court of Appeals agreed, stating:

> Under the "co-plaintiff" doctrine, Indian tribes may claim a private cause of action when the United States is a trustee and is entitled to sue to protect the tribe's rights. *See e.g., Keaukaha I,* 588 F.2d at 1224 n. 7; *Agua Caliente Band of Mission Indians* v. *County of Riverside,* 442 F.2d 1184, 1186 (9th Cir. 1971), *cert. denied,* 405 U.S. 933, 92 S.Ct. 930, 30 L.Ed.2d 809 (1972); *see also Poafpybitty* v. *Skelly Oil Co.,* 390 U.S. 365, 366-72, 88 S.Ct. 982, 982-86, 19 L.Ed.2d 1238 (1968). But because the United States is not a formal trustee of the § 5(f) homelands trust, *see Keaukaha I,* 588 F.2d at 1224 n. 7, and nothing in the legislative history or case interpretation indicates that Congress intended a different result for the § 5(f) ceded land trust at issue here, we hold that the Hou cannot claim a private cause of action under the "co-plaintiff" doctrine. 764 F.2d at 631.
>
> *See also Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661, 39 L.Ed.2d 73 (1974); *Gila River Indian Community* v. *Henningson, etc.,* 626 F.2d 708 (9th Cir. 1980); *Mescalero Apache Tribe* v. *Burgett Floral Co.,* 503 F.2d 336 (10th Cir. 1975); *Pueblo of Isleta* v. *Universal Constructors, Inc.,* 570 F.2d 300 (10th Cir. 1978).

Since there is no conflict in the decisions of the various circuits in regard to the jurisdictional reach of § 1362, there seems to be no plausible reason to review the lower Court's conclusion.

III. The Ninth Circuit's Decision That This Suit Against The State Is Barred By The Eleventh Amendment Is Too Well Established To Require Further Review By This Court.

The Ninth Circuit noted that The State of Hawaii had not waived its sovereign immunity from suit and asserted its constitutional protection under the Eleventh Amendment.

The Court, after citing *Edelman* v. *Jordan,* 415 U.S. 651, 39 L.Ed.2d 662 (1974) and *Pennhurst State School & Hospital* v. *Halderman,* 465 U.S. 89, 79 L.Ed.2d 67 (1984) ("Pennhurst II"), concluded:

> Although the text of the Admission Act unmistakably authorizes the United States to bring suit against the State, we find no express language or legislative history proving that the State has lost its sovereign immunity from suit by the Hou. The Hous' claims against the State of Hawaii, its Department of Transportation, and its Department of Budget and Finance are therefore dismissed. 764 F.2d at 629.

A long line of Supreme Court cases and federal cases has addressed the issue of a State's constitutional protection under the Eleventh Amendment. Certain well established principles have emerged from the plethora of cases on the subject matter.

Clearly, further review of a State's protection under the Eleventh Amendment is not required in this instance, since the State itself is being sued in this action.

IV. It Is Clear That The Hous' Cannot Claim A Private Cause Of Action Under The Admission Act.

One of the issues in *Keaukaha I* was whether individual native Hawaiians had a private cause of action to enforce the Admission Act. This Court denied certiorari in that case. [*See* 444 U.S. 826 (1979)].

The Ninth Circuit requested supplemental briefing on the issue of whether the Court could imply a private cause of action for the Hou Hawaiians to enforce the Admission Act when *Keaukaha I* held that Congress did not intend individual native Hawaiians to have a private cause of action.

Obviously, Petitioner did not satisfy the Court that the Hou, as distinguished from individual native Hawaiians, enjoyed a private cause of action. The Court stated in relevant part:

> [N]othing in the legislative history of the Admission Act indicates that Congress intended native Hawaiian groups as distinguished from individual Hawaiians whose claims were rejected in *Keaukaha I* to enjoy a private cause of action. 764 F.2d at 631.

Thus, the claim against Governor George Ariyoshi was properly dismissed.

CONCLUSION

Petitioner has cited to no authority which supports its contentions. One need only to read the Ninth Circuit Court's scholarly and careful opinion to realize that the Court gave Petitioner every opportunity to establish that it was entitled to § 1362 jurisdiction as an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior," and it could not do so.

Additionally, Petitioner's contention is not a matter of national concern. It is a purely local matter, does not reach the level of "extraordinary magnitude," and is not likely to recur.

The court applied the correct principles of law and properly and correctly reached the right result. There being no error, the Petition should be denied.

DATED: Honolulu, Hawaii, December 2, 1985.

Respectfully submitted,

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No. 85-529

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October Term, 1985

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Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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SUPREME COURT OF THE UNITED STATES

October Term, 1985

HOU HAWAIIANS,

Petitioner,

v.

STATE OF HAWAII, et.al.,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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1. Reasons why this Court should accept certiorari in this case:

There are several compelling reasons why this court should accept certiorari in this case. These can be summarized as follows:

a. The Ninth Circuit has treated Native Hawaiians differently than other Native Americans, excluding this aborigi-

nal group from the full protection of the Federal law applicable to all other Native Americans. The decision aversely affects other Pacific Island aboriginal groups within the jurisdiction of the United States, such as the Micronesians and Samoans.

b. The Ninth Circuit has made new law by deciding that a tribe or governing body must meet the stringent recognition requirements under the Indian Reorganization Act in order to be considered "recognized" for purposes of 28 U.S.C. §1362. Such a ruling is unsupported and unjustified by Congressional intent, prior case law, or logic, since "recognition" under the IRA entitles the tribe to a host of Federal benefits while "recognition" under §1362 only allows the tribe access to Federal Court. Such a ruling will be detrimental to Native Americans in

general.

c. The "Catch-22" procedure employed in the District Court's dismissing of the case for lack of jurisdiction irrespective of what evidence might be introduced at trial and the Ninth Circuit's then dismissing for lack of jurisdiction because Petitioner had failed to prove that it was "recognized" could be used to destroy the rights of anyone, Native American or otherwise, and is sufficiently a departure from proper procedure that this Court should review this case under its supervisory powers.

d. If this court does not accept certiorari, there will be no way for Native Hawaiians to obtain any compensation or damages for the State's past abuse of the trust relationship in failing to distribute the homestead lands or expend

§5(f) funds for their benefit; additionally, the decision below may even deny Native Hawaiians any relief in Federal court to obtain enforcement of the 5(f) / homelands trust.

e. As this case involves a Federal-State compact and a condition of Statehood which the Ninth Circuit has ruled is unenforcable by any of its beneficiaries for past neglect, the case presents an important issue of Federal-State relations and, by implication, Federal relations with the Pacific trust territories.

As previously argued in the Petition for Certiorari, the Ninth Circuit has ruled that neither Petitioner nor its governing body has been recognized by the Secretary of Interior and that, therefore, access to Federal Court under 28 U.S.C. §1362 is unavailable to Petitioner. This ruling was arrived at by means of a

"Catch-22"; the District Court first dismissed the complaint on the basis that, whatever Petitioner could prove at trial regarding its tribal status or Secretarial recognition, the §5(f) / homelands trust claims could not be addressed under §1362. The Ninth Circuit, unable to uphold the district court's illogic, dismissed the case because Petitioner had not proven its tribal status or Secretarial recognition.

By so ruling, the Ninth Circuit has denied Native Hawaiians any access to Federal court to obtain compensation for damages for the State of Hawaii's past violations of the 5(f) / homelands trust during its 26 years of statehood. See Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 588 F.2d. 1216 (9th Cir. 1978) ("Keaukaha I") , cert. den. 444 U.S. 826 (1979). The effect of

these two decisions is obviously to discriminate against Native Hawaiians vis a vis other Native Americans. Compare, Oneida Indian Nation of New York v. State of New York, 691 F.2d. 1070 (2nd. Cir. 1982) and Oneida Indian Nation of New York v. County of Oneida, 84 L.Ed. 2d. (Federal court has jurisdiction over Oneida Indians' claim for 190 years of back rent from the State of New York.)

The Ninth Circuit's decision may go even further and completely bar access to Federal Court for Native Hawaiians to enforce the §5(f) / homelands trusts, even for prospective injunctive and declaratory relief.[1] Although, in 1984, a different

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1. In its opposition brief, the State has argued, in a contradictory way, both that Petitioner has access to Federal court and that it does not. See arguments at pages 7 and 10 of the Brief. The State's "concession" that Petitioner would have access to Federal Court "in an appropriate case" (whatever it feels that is) and its citation to Ahuna v. Department of Hawaiian Home Lands, 64

panel of the Ninth Circuit ruled that a Native Hawaiian community association could bring an action under 28 U.S.C. §1983 to enforce these laws, see Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, ("Keaukaha 2"), 739 F.2d. 1467 (9th Cir. 1984), the panel below has arguably foreclosed this possibility in its opinion, although it declined to overrule the previous panel's year-old decision. See Price v. State of Hawaii, 764 F.2d. at 631.

For these reasons, it is imperative that this court accept certiorari of this case.

Haw. 327, 640 P.2d. 1161 (1982) is misleading and dangerous; in Ahuna, because the State raised the claims of soverign immunity and a lack of a private right of action for the first time on appeal, the Hawaii Supreme Court ruled that the claims were not properly before it.

2. The State's reasons for this court's declining certiorari are unconvincing.

The State has advanced several reasons for this court's declining certiorari in a section entitled "Reasons for Granting the Writ." The State's arguments are insubstantial or result from misinterpretations of the opinion below.

a. The State's argument that no other Native Hawaiian group has ever claimed to be "Indian" is unsupported by the record, irrelevant and untrue.

The State argues that no other Native Hawaiian group has ever claimed to be an "Indian tribe or band" or claimed that its members are "Indians", and that, while in the court, they litigate as "Native Hawaiians." There is no evidence in the record to support such a claim and reported case authority contradicts it. [2].

2. In Keaukaha 1, the Native Hawaiian community association claimed "that, as native Hawaiians, they should receive the benefits of cases that

Even if the claim was true, it is irrelevant to the issues before this court and should be disregarded.

b. The jurisdictional reach of §1362 is not limited to land claims where the United States holds the title to the land in trust for individual Indians or a tribe.

The State claims, on page 8 of its brief, that the Ninth Circuit ruled that §1362 is limited to land claims where the United States holds title to the land in trust, and that "this is in accord with the decision of every court which has addressed the jurisdictional reach of §1362."

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have allowed native Americans (American Indians) a private federal right of action" under the "co-plaintiff" doctrine. See Keaukaha 1, 588 F.2d. at 1224, n. 7.

The State's assertion is contradicted by this Court's decision in Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 F.2d 463, 96 S.Ct. 1634, 48 L.Ed. 2d. 96 (1976), a case which did not even involve land, but rather, involved state taxes on motor vehicles and cigarettes. In describing the power of the United States to bring actions "as the tribe's trustee", this court specifically quoted its previous decision in United States v. Rickert, 188 U.S. 432 (1903):

> "'[T]he decision [that the United States had the requisite interest] rested on a broader foundation than the mere holding of a legal title to land in trust, and embraced the recognition of the interest of the United States in securing immunity to the Indians from taxation conflicting with the measures it had adopted for their protection.' 224 U.S. at 441.

> Here, the United States could have made the same attack on the State's assertion of taxing power as was in fact made by the Tribe. Heckman v. United States, supra. We think that the legislative history of §1362, though by no means dispositive, suggests that in certain respects tribes suing under this section were to be accorded treatment similar to that of the United States had it sued in their behalf." 425 U.S. at 473-4.

See also Confederated Tribes of the Colville Indian Reservation v. State of Washington, 446 F. Supp. 1359, 1350 (E.D. Wash. 1978), aff'd and rev'd on other grounds, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed. 2d. 10, a case also involving §1362 jurisdiction over State taxes on Indian personal property.

In that portion of the opinion below discussed by the State, the Ninth Circuit actually assumed that Petitioner did not qualify for jurisdiction under §1362, and discussed the possibility that Petitioner

might qualify under the judicially created "co-plaintiff" doctrine as a non-recognized tribe or a collection of individuals. The Ninth Circuit did not seek to limit §1362 to situations where the "co-plaintiff" doctrine could also apply.[3]

c. The Eleventh Amendment does not bar a suit for damages against the State under §1362.

According to the State, the Ninth Circuit has ruled that Petitioner's suit for damages under 28 U.S.C. §1362 is barred by the Eleventh Amendment and that this principle is "too well established to

3. The "co-plaintiff" doctrine, which allows individual Indians access to Federal Court, is indeed restricted to Federal land trust situations, (see Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d. 1184, 1186 (9th Cir. 1971)), but was not relied upon by Petitioner in the action below, and is only relevant if it is determined that Petitioner cannot qualify for §1362 jurisdiction. While the District Court mistakenly equated the "co-plaintiff" doctrine with §1362, the Ninth Circuit, notably, was unable to uphold the District Court's opinion on this ground.

require further review" by this court.

Assuming that the Ninth Circuit had so ruled, such a ruling would contradict all of the Federal case law since this court's decision in Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 F.2d 463, 96 S.Ct. 1634, 48 L.Ed. 2d. 96 (1976), and would justify acceptance of certiorari and reversal by this court. See Confederated Tribes of the Colville Indian Reservation v. State of Washington, 446 F. Supp. 1359, 1350 (E.D. Wash. 1978), aff'd and rev'd on other grounds, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed. 2d. 10, (damages for interference with cigarette businesses) Oneida Indian Nation of New York v. State of New York, 691 F.2d. 1070 (2nd. Cir. 1982), (back rent and possession of land) Cayuga Indian Nation of New York v. Cuomo, 565 F. Supp. 1297 (1983) (back rent and posses-

sion of land), Charrier v. Bell, 547 F. Supp 580 (D.C.La 1982) (recovery of value of Indian artifacts), Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin, 595 F. Supp. 1077 (1984) (retroactive monetary relief for State's violation of hunting and fishing rights), Aguilar v. Kleppe, 421 F. Supp 433, 436 (D. Alaska 1976) (dicta.)

The portion of the opinion below cited by the State, however, assumes that Petitioner did not qualify for §1362 jurisdiction and held merely that the Eleventh Amendment would bar a suit for damages under 28 U.S.C. §1331.

3. Conclusion

For the above reasons, this Court should accept certiorari of this case.

In 25 years of administration of the homelands / §5(f) trust, the State has

distributed approximately 8 percent of the homelands to the beneficiaries. At the present rate, it would take an additional 275 years for the State to distribute the remainder of the homelands. The State has claims that it lacks the money to distribute the homelands any faster, but has failed to use any of the §5(f) land income to fund the homelands program. For whatever reason, Interior has been disinclined to enforce the trust in favor of the beneficiaries.

If the beneficiaries of the trust are not allowed access to Federal court to enforce the trust, the alternatives are:

a. that the trust will not be enforced, and the homelands not distributed, i.e., continuation of the present situation;

b. that Congress appropriate additional money to fund the distribution of

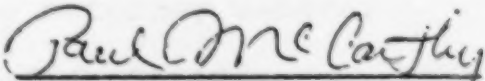
the homelands;

c. that Congress, deciding the trust is a failure, devise some other means of compensating the Native Hawaiians, such as authorizing the settlement of native claims or appropriating funds for "reparations".

The choice between denial of rights to Native Hawaiians and apropriation of substantial additional funds by Congress is not inevitable. At the time of Statehood, Congress transferred substantial amounts of income-producing Federal land to the State along with the homelands. The §5(f) lands have produced far greater income than was needed to improve and distribute the homelands, yet the State has, by their own admission, refused to expend any of this money on the homelands program. The trust beneficiaries sould be

accorded a fair opportunity in court to rectify this failure.

DATED: Honolulu, Hawaii, December 26, 1985.



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the within were delivered to the office of the following person on December 27, 1985.

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